Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47, and 77-64

EXXON CORPORATION and PHILLIPS PETROLEUM COMPANY,

SHELL OIL COMPANY,

CONTINENTAL OIL COMPANY and KAYO OIL COMPANY,

GULF OIL CORPORATION,

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC. and PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPENDIX

Volume I – Pages 1-424

APPEALS DOCKETED JULY 1, 8 AND 11, 1977

PROBABLE JURISDICTION NOTED OCTOBER 3, 1977

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Memorandum of Opinion of the Circuit Court for Anne Arundel County dated January 27, 1976 appears in the Joint Appendix to Jursidictional Statements at pages 53a to 134a.

Opinion of the Court of Appeals of Maryland dated February 18, 1977 is printed at 279 Md. 410 (advance reports) and at 370 A.2d 1102 and appears in the Joint Appendix to Jurisdictional Statements at pages 1a to 44a.

Supplemental Opinion of the Court of Appeals of Maryland dated April 13, 1977 is printed at 279 Md. 456 (advance reports) and at 372 A.2d 237 and appears in the Joint Appendix to Jurisdictional Statements at pages 45a to 48a.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Equity Nos. 22,069; 22,091; 22,216; 22,461; 22,502; 22,562 and 22,551

June 17, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Exxon Corporation)
June 28, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Continental Oil Company and Kayo Oil Company)
July 5, 1974	Answer (to Exxon Bill of Complaint)
July 8, 1974	Stipulation regarding Stay of Enforcement
August 5, 1974	Answer (to Continental and Kayo Bill of Complaint)
September 3, 1974	Bill of Complaint for Declaratory Judgment and Injunctive Relief and Exhibit (Shell Oil Company)
October 22, 1974	Answer (to Shell Bill of Complaint)
October 25, 1974	Amendment to Answer (to Shell Bill of Complaint)

November 14, 1974	Order consolidating Exxon, Continental and Shell cases
January 23, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Gulf Oil Corporation)
February 3, 1975	Answer (to Gulf Bill of Complaint)
February 5, 1975	Order consolidating Gulf with Exxon, Continental and Shell
February 14, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Phillips Petroleum Company)
March 5, 1975	Answer (to Phillips Bill of Complaint)
March 20, 1975	Bill of Complaint for Declaratory Decree and Injunctive Relief and Exhibit (Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.)
March 26, 1975	Bill of Complaint for Declaratory Judgment and Injunctive Relief (Ashland Oil, Inc.)
March 31, 1975	Order consolidating Ashland with Exxon, Continental, Shell and Gulf
March 31, 1975	Order consolidating Phillips with Exxon, Continental, Shell, Gulf and Ashland
April 1, 1975	Answer (to Petroleum Marketing and Commonwealth Bill of Complaint)
April 8, 1975	Answer (to Ashland Bill of Complaint)
May 5, 1975	Case called for Hearing on Pre-Trial Conference in Open Court before Judge E. Mackall Childs. Counsel heard, Court signed order

May 5, 1975	Order Entered at Pre-Trial Conference regarding non-enforcement of the provisions of Chapter 854 of the Laws of Maryland pending outcome of the case
May 20, 1975	Joinder of Ashland in Pre-Trial Stipulations
May 29, 1975	Shell's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, Memorandum of Points and Authorities In Support of Motion and Affidavit of Walter D. Naughton
May 29, 1975	Exxon's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974 and Memorandum in support thereof
June 19, 1975	Gulf's Motion for Partial Summary Judgment as to Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, and Affidavit
July 7, 1975	Answer to Motions for Partial Summary Judgment of Plaintiffs Exxon, Shell, and Gulf
July 7, 1975	Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Partial Summary Judgment

July 7, 1975	Affidavit of James M. Patterson, Ph.D.
July 28, 1975	Order consolidating Petroleum Marketing and Commonwealth with Exxon, Continental, Shell, Gulf, Phillips and Ashland
July 28, 1975	Joinder of Petroleum Marketing and Commonwealth in Pre-Trial Stipulations
August 11, 1975	Plaintiffs'(Shell, Continental, Kayo, Gulf, Phillips and Ashland) Motion for Partial Summary Judgment as to Paragraphs B and C of Chapter 854, Laws of Maryland, 1974
August 11, 1975	Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment
August 22, 1975	Case called for Hearing on Motion of Exxon, Shell and Gulf for Partial Summary Judgment as to Paragraphs D and F of Chapter 854, in Open Court before Judge E. Mackall Childs, Counsel heard. Court will hold under advisement. Argument on Paragraph F delayed pending action on Federal Allocation Act
September 9, 1975	Motion of Day Enterprises, Inc., *et al.* for Leave to Appear and Present Memoranda and Argument as Amicus Curiae and Exhibits
September 9, 1975	Memorandum of Amici Curiae in support of the Constitutional validity of Article 56 Sections 157

	E(B) and (C) of the Annotated Code of Maryland
September 22, 1975	Defendants' Answer to Motion for Partial Summary Judgment filed by the Plaintiffs Shell, Continental, Kayo, Gulf, Phillips, and Ashland and Memorandum of law in support of Defendants' Answer
October 9, 1975	Pre-Trial Order and appendices A, B, C, D, E and F
October 10, 1975	Appendix G to Pre-Trial Order
October 14, 1975	Case called for Hearing on Merits in Open Court before Judge E. Mackall Childs. Prior to Testimony, Court orally granted Plaintiffs' Motion for Partial Summary Judgment. Testimony taken. Case continued to October 15, 1975
October 14, 1975	Memorandum declaring Paragraph D of Chapter 854 of the Laws of Maryland, 1974, invalid
October 15, 1975	Case continued on merits in Open Court before Judge E. Mackall Childs. Testimony taken. Case continued to October 16, 1975
October 16, 1975	Case continued on merits in Open Court before Judge E. Mackall Childs. Testimony taken. At conclusion of Plaintiffs' testimony, State moved to stay proceedings pending appeal of Court's ruling as to Paragraph "D". Court denied motion. Testimony continued to October 17, 1975

October 17, 1975	Case continued on Merits in Open Court before Judge E. Mackall Childs. Testimony taken. State continued case to October 20, 1975 for purpose of oral arguments of Counsel
October 20, 1975	Case continued on Merits in Open Court before Judge E. Mackall Childs. Counsel heard. Court will hold under advisement
January 27, 1976	Memorandum of Opinion by Judge E. Mackall Childs declaring Chapter 854 of the Laws of Maryland, 1974 and Chapter 608 of the Laws of Maryland, 1975 unconstitutional and void
February 2, 1976	Order for Appeal by Marvin Mandel, Governor, *et al.*
February 23, 1976	Motion of Defendants to Stay the Judgment of Court entered January 27, 1976 and Memorandum of Points and Authorities
March 15, 1976	Stipulation and Consent Order granting continuance of Order of Court entered May 5, 1975
April 18, 1977	Order by Judge E. Mackall Childs reversing and dissolving Declaration and Injunction dated January 27, 1976
June 23, 1977	Notice of Appeal to the Supreme Court of the United States by Shell

June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Exxon and Phillips
June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Continental and Kayo
June 27, 1977	Notice of Appeal to the Supreme Court of the United States by Gulf
July 1, 1977	Notice of Appeal to the Supreme Court of the United States by Ashland
July 11, 1977	Notice of Appeal to the Supreme Court of the United States by Petroleum Marketing and Commonwealth Oil

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COURT OF APPEALS OF MARYLAND

September Term, 1976

No. 10

February 17, 1976	Petition for Writ of Certiorari to the Court of Special Appeals of Maryland
April 5, 1976	Order Granting Writ of Certiorari
September 15, 1976	Oral Argument
February 18, 1977	Court of Appeals of Maryland Opinion and Judgment by J. Eldridge

March 17, 1977	Motion for Stay of Mandate, To Prohibit Enforcement of Chapter 854 of the Laws of Maryland, 1974, as Amended by Chapter 608 of the Laws of Maryland, 1975, and For Other Relief (and Proposed Order)
March 18, 1977	Motion for Reconsideration by Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, and Phillips Petroleum Company
March 18, 1977	Motion for Reconsideration by Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.
March 18, 1977	Motion for Reconsideration by Continental Oil Company and Kayo Oil Company
March 21, 1977	Motion for Reconsideration by Ashland Oil, Inc.
March 24, 1977	Answer of Appellants to Motion for Stay of Mandate, to Prohibit Enforcement of Chapter 854 of the Laws of Maryland, 1974, as Amended by Chapter 608 of the Laws of Maryland, 1975, and For Other Relief
April 13, 1977	Opinion by J. Eldridge denying Motions for Reconsideration and Motion for Stay of Mandate
April 13, 1977	Mandate

June 23, 1977	Notice of Appeal to the Supreme Court of the United States of Shell Oil Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Exxon Corporation and Phillips Petroleum Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Continental Oil Company and Kayo Oil Company
June 27, 1977	Notice of Appeal to the Supreme Court of the United States of Gulf Oil Corporation
June 29, 1977	Amended Notice of Appeal to the Supreme Court of the United States of Exxon Corporation and Phillips Petroleum Company
July 1, 1977	Notice of Appeal to the Supreme Court of the United States of Ashland Oil, Inc.
July 11, 1977	Notice of Appeal to the Supreme Court of the United States of Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.

In the Circuit Court for Anne Arundel County

Equity No. 22,069

Exxon Corporation,

Plaintiff,

v.

Marvin Mandel, Governor, et al.,

Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed June 17, 1974

Exxon Corporation ("Exxon"), plaintiff herein, by its attorneys, brings this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Exxon declares and alleges as follows:

The Parties

1. Exxon, incorporated under the laws of the State of New Jersey, is a producer and refiner of petroleum

products and owns and operates retail service stations in the State of Maryland. Exxon believes it is the leading supplier of gasoline in Maryland selling to dealers, wholesalers, the public and others approximately 19 percent of all the gasoline sold in Maryland. All of the gasoline sold by Exxon in Maryland is transported into the state from refineries located beyond the boundaries of the state.

2. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

3. There are approximately 483 independent dealer stations in Maryland buying Exxon branded gasoline directly from Exxon. In addition, Exxon has 35 company-operated stations in Maryland. Of the 35 company-operated stations, 12 are Exxon "Car Care Centers." In addition to marketing gasoline, Car Care Centers sell automobile products, such as tires, batteries and accessories, and provide a complete range of automobile maintenance and repair services. Each Car Care Center requires large initial and sustained capital investment in land, buildings and equipment.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiff's Exhibit No. 1. The Act becomes effective July 1, 1974 and amends Article 56, §157E by adding to §157E the following provisions:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

10. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Exxon due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e. the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others

similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff's substantial investment in retail service stations and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and Is Discriminatory

11. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974 and, in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires plaintiff and others similarly situated to divorce themselves totally from the retail service station business. Plaintiff has been in the retail service station business in Maryland for over twenty years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

12. By prohibiting refiners and producers from operating retail service stations, the Act removes a class

of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing producers and refiners from the retail gasoline market and by requiring producers, refiners, and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

13. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Existing state and federal law, including other legislation enacted at the 1974 Session of the General Assembly (see Chapter 852), provide for far less restrictive alternatives for achieving any such legitimate objective. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

14. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Exxon the right to earn a reasonable rate of return on its investment and takes Exxon's property without compensation and for private use.

15. The Act establishes an arbitrary July 1, 1975 divestiture date, within which one-year period Exxon believes that it will be difficult, if not impossible, to enter

into satisfactory contractual arrangements with suitable dealers. Exxon will lose substantial portions of its investment in those service stations which will have to be closed if satisfactory arrangements with a dealer cannot be worked out prior to the imposed deadline.

The Act Constitutes an Unlawful Delegation of Authority

16. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Exxon from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

17. Paragraph D of the Act provides that every producer, refiner and wholesaler shall extend all "voluntary allowances" uniformly to all "dealers supplied." The term "voluntary allowances" is the critical operative language of that paragraph of the Act and is not defined. It is unclear what is encompassed by that term. Nor is it clear what dealers are encompassed by the term "dealers supplied." In addition, the Act provides no guidance as to the meaning of the word "uniformly," a word used in

Paragraphs D, E, and F of the Act. The ambiguity and vagueness of the terms may produce results that it is unlikely that the Legislature wished to produce. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1973 Cumulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the terms referred to, the Act is unconstitutionally vague.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

18. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

19. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the

weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here). (Emphasis added.) Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in § 12.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery. (Emphasis added)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973.

20. Paragraph D of the Act amending §157E of Article 56 also conflicts with another section of the Petroleum Allocation and Price Regulations. 10 C.F.R.

§210.62 provides that a supplier may not "modify any . . . *normal business practice* so as to result in circumvention of any provision of this chapter." (Emphasis added.) The granting of legally sanctioned price differentials and allowances is a normal business practice. Compliance with Paragraph D's requirement that allowances be extended uniformly would, therefore, be a deviation from a normal business practice and would have the effect of frustrating or impairing the objectives of the Regulations to the extent that the price differentials and allowances are part of the mechanism sanctioned by the Regulations for controlling the price of petroleum products.

21. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a

purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973.

The Act Conflicts with the Robinson-Patman Act, 15 U.S.C. §13

22. The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to all retail service station dealers supplied" conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland anti-trust law). Under both the federal and state anti-trust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis regardless of

any rationale or justification for the granting of any form of allowance on a more limited geographic basis. This provision of the Act therefore conflicts with and is preempted by the federal law.

23. Exxon has no adequate remedy at law.

24. In view of the aforementioned allegations, an actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Exxon respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgment Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiff declaratory relief pursuant to the Uniform Declaratory Judgment Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and

Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/ William L. Marbury,
/s/ Lewis A. Noonberg,
Piper & Marbury
Attorneys for the Plaintiff.

Of Counsel:
Richard P. Delaney.

PLAINTIFF'S EXHIBIT NO. 1

Certified to be a true and correct copy of Chapter 854 of the Acts of the General Assembly of Maryland 1974.

/s/Carl N. Everstine
Carl N. Everstine, Director
State Department of Legislative

SENATE BILL No. 465. Reference

Introduced by Senator Pine (Departmental)

Read and Examined by Proof Reader:

_____
Proof Reader.

_____
Proof Reader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____ m.

Secretary

APPROVED

By the Governor
May 31 '74

CHAPTER 854

AN ACT concerning

Licenses – Retail Service Stations

FOR the purpose of prohibiting producers[[,]] *or* refiners[[, and wholesalers]] of petroleum products from operating retail service stations *permitting the Comptroller to adopt rules or regulations which define the circumstances on which a producer or refiner may operate temporarily a previously dealer-operated station, requiring the Comptroller to permit certain exceptions to the divestiture dates of considering all of the relevant facts and reaching certain conclusions* and regulating voluntary allowances and rental agreements.

BY repealing and re-enacting, with amendments,

Article 56 – Licenses
Section 157E
Annotated Code of Maryland
(1972 Replacement Volume and 1973 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter stricken from existing law. [[Double brackets]] indicate matter stricken out of bill. *Underlining* indicates amendments to bill.

SENATE BILL No. 465

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section 157E of Article 56 – Licenses, of the Annotated Code of

Maryland (1972 Replacement Volume and 1973 Supplement) be and it is hereby repealed and re-enacted, with amendments, to read as follows:

Article 56 – Licenses

157E.

(A) For the purpose of this law all gasoline and special fuels sold or offered or exposed for sale shall be subject to inspection and analysis as hereinafter provided. All motor fuel wholesalers, diesel fuel sellers, heating oil distributors, manufacturers, refiners, jobbers and retail service station dealer before selling or offering for sale any gasoline: other motor vehicle fuels, or special fuels under whatever name designated for power and heating purposes shall file with the Comptroller of the Treasury a declaration or statement that they desire to sell such products in this State and shall furnish the name, brand or trademark of the products which they desire to sell together with the name and address of the supplier thereof and that all such products are in conformity with the specifications established by the Comptroller of the Treasury, as purchased from the supplier and he will make no alteration to any such product received from the supplier.

(B) AFTER JULY 1, 1974, NO PRODUCER[[,]] *OR* REFINER [[OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPEN AND OPERATE WITH COMPANY PERSONNEL, A RETAIL SERVICE STATION UNDER A MAJOR BRAND, SECONDARY OR UNBRANDED STATION]] *OF PETROLEUM PRODUCTS SHALL OPEN A MAJOR BRAND, SECONDARY BRAND OR UNBRANDED RETAIL SERVICE STATION IN THE STATE OF MARYLAND, AND OPERATE IT WITH COMPANY PERSONNEL, A SUBSIDIARY COMPANY, OR A COMMISSIONED AGENT.*

(C) AFTER JULY 1, 1975, NO PRODUCER[[,]] *OR* REFINER [[OR WHOLESALER OF PETROLEUM PRODUCTS SHALL OPERATE ANY CLASS OF RETAIL SERVICE STATION IN THE STATE OF MARYLAND]] *OF PETROLEUM PRODUCTS SHALL OPERATE A MAJOR BRAND, SECONDARY BRAND, OR UNBRANDED RETAIL SERVICE STATION IN THE STATE OF MARYLAND, WITH COMPANY PERSONNEL, A SUBSIDIARY COMPANY, OR A COMMISSIONED AGENT.*

(D) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(E) EVERY PRODUCER, REFINER, OR WHOLESALER OF PETROLEUM PRODUCTS SUPPLYING GASOLINE AND SPECIAL FUELS TO RETAIL SERVICE STATION DEALERS SHALL APPLY ALL EQUIPMENT RENTALS UNIFORMLY TO ALL RETAIL SERVICE STATION DEALERS SUPPLIED.

(F) EVERY PRODUCER, REFINER OR WHOLESALER OF PETROLEUM PRODUCTS SHALL APPORTION UNIFORMLY ALL GASOLINE AND SPECIAL FUELS TO ALL RETAIL SERVICE STATION DEALERS DURING PERIODS OF SHORTAGES ON AN EQUITABLE BASIS, AND SHALL NOT DISCRIMINATE AMONG THE DEALERS IN THEIR ALLOTMENTS.

(G) THE COMPTROLLER MAY ADOPT RULES OR REGULATIONS DEFINING THE CIRCUMSTANCES IN WHICH A PRODUCER OR REFINER TEMPORARILY MAY OPERATE A PREVIOUSLY DEALER-OPERATED STATION.

(H) THE COMPTROLLER MAY PERMIT REASONABLE EXCEPTIONS TO THE DIVESTITURE DATES SPECIFIED BY THIS SECTION AFTER CONSIDERING ALL OF THE RELEVANT FACTS AND REACHING REASONABLE CONCLUSIONS BASED UPON THOSE FACTS.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1974.

Approved:

_____
Governor.

_____
President of the Senate.

_____
Speaker of the House of Delegates.

ANSWER
(To Exxon Bill of Complaint)

Filed July 5, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit the allegations contained in paragraph 1.

2. That they admit that Exxon sells gasoline and other petroleum products at the retail level in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they admit the allegations contained in paragraph 3 but are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the last sentence in paragraph 3 of said Bill.

4. That they admit the allegations contained in paragraphs 4 through 9, inclusive.

5. That they deny the allegations contained in paragraph 10 of said Bill, specifically answering:

(a) That the Act bears a substantial relation to the economic welfare and continuing existence of the retail service station dealers and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State.

(b) That the Act does not deny plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

(c) That the Act does not constitute a taking of plaintiff's property without compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

(d) That the Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

(e) That the Act is not so vague as to deny plaintiff due process in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

(f) That the Act does not discriminate against nor unduly burden interstate commerce so as to be invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

(g) That the Act does not conflict with any Federal statute and, therefore, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

6.(a) That they deny the allegations contained in the first sentence of paragraph 11 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) That they are without knowledge sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph 11 of said Bill.

(c) That they deny the allegations contained in the third and fourth sentences of paragraph eleven. The Legislature, after hearing testimony of the tremendous financial influence and control exercise by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

7. That they deny the allegations contained in paragraphs 12 through 14, inclusive, of said Bill.

8. That they admit that July 1, 1975 is established by the Act as the date by which divestiture must take place, but deny the other allegations contained in paragraph 15 of said Bill. That they state further that they have been advised and know of responsible and experienced retail service station dealers who are prepared to operate the Exxon Car Care Centers upon what they believe will be a profitable basis for Exxon and themselves provided that the terms of their leases from Exxon are negotiated at arms length and are fair and equitable to both lessee and lessor.

9. That they admit the allegations contained in the first two sentences of paragraph 16 and deny the allegations contained in the third and fourth sentences of paragraph 16.

10. That they admit the allegations contained in the first sentence of paragraph 17. That they admit the allegations of the second, fourth and fifth sentences of paragraph 17 in that the terms "voluntary allowances" and "dealers supplied" and "uniformly" are undefined by the Act, but deny that such terms are unclear as alleged in the third and fourth sentences of paragraph 17. That they further deny the allegations contained in the fifth, sixth and seventh sentences of paragraph 17 of said Bill.

11. That they admit the allegations contained in paragraph 18.

12. That they admit the allegations contained in the first five sentences of paragraph 19 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 19 of said Bill because the effect of the federal regulations is to make any allowance extended by Exxon to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act

refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act.

13. That they deny the allegations contained in paragraph 20 as to any conflict between Chapter 854 and 10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation and added its emphasis is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requirement of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n]o supplier shall engage in any form of discrimination among purchasers of any allocated product."

14. That they admit the allegations in paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

15. That they deny the allegations in paragraph 22 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83 §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anti-competitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

16. That they admit paragraphs 23 and 24.

Further answering:

17. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

18. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Exxon can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

19. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sale but can make its profit through producing, refining, wholesaling and transportation. Consequently companies such as Exxon can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

20. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Exxon have led to economic chaos in the retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

21. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Exxon can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level that would otherwise have existed.

22. That they state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1973 and that there were 303 fewer service stations to serve the public at the end of the same period.

23. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell. The Gasoline Tax Division also found that certain producers and refiners other than

Exxon had terminated leases of retail dealers and converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that any stipulations entered into by either party pursuant to this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General,
Attorneys for Defendants.

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,091

Continental Oil Company, et al.,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed June 28, 1974

Continental Oil Company ("Conoco") and Kayo Oil Company ("Kayo"), plaintiffs herein, by their attorneys, bring this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Plaintiffs declare and allege as follows:

The Parties

1. Conoco, incorporated under the laws of the State of Delaware, is a producer and refiner of petroleum products, but does not operate branded retail service stations in the State of Maryland. Conoco does not sell branded gasoline to dealers or jobbers in Maryland. All of the gasoline sold by Conoco in Maryland is manufactured at Conoco's refinery at Westlake, Louisiana, and is then delivered into Conoco's Baltimore Terminal via the Colonial Pipe Line, a common carrier pipeline which operates in interstate commerce.

2. Kayo, incorporated under the laws of the State of Delaware, is a wholly owned subsidiary of Conoco, and owns and operates retail service stations in the State of Maryland. Kayo does not presently, nor has it ever, sold any gasoline to dealers or jobbers in Maryland. Kayo has always sold its gasoline to the motoring public directly through employee operated gasoline outlets. Kayo has never sold its gasoline to the motoring public through dealer operated service stations in Maryland or in any other state. All gasoline sold by Kayo in Maryland is sold to Kayo by its parent corporation, Conoco, and is transported into the state from a refinery located beyond the boundaries of the State of Maryland as described in paragraph one (1).

3. Kayo sells substantial quantities of gasoline and other petroleum products at the retail level both in local markets in Maryland and to persons, such as travelers, some of whom operate in interstate commerce.

4. Kayo has 15 company-operated stations in Maryland. Each such station operates as a limited service retail unit in dispensing gasoline to the motoring public. Although each retail unit requires a large investment for land, buildings and equipment, Kayo stations have

consistently sold gasoline at a lower cost to consumers than major branded dealers because of the cost efficiencies realized through its high volume limited service mode of operation. Kayo has been known throughout the industry as a "low price marketer", affording the motoring public a high quality product at a price consistently lower than most prevailing prices.

5. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

6. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against the persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

7. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

8. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the

Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

9. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

10. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiffs' Exhibit No. 1. The Act becomes effective July 1, 1974 and amends Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

11. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Conoco and Kayo due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiffs, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities denies plaintiff, and other similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff Kayo's substantial investment in retail service stations and a part or all of Kayo's return on investment

without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiffs against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiffs can determine whether or not they are subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiffs due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is, therefore, invalid under the Supremacy Clause of Article VI of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and is Discriminatory

12. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974, and, in prohibiting producers or refiners from operating

retail service stations after July 1, 1975, the Act requires plaintiffs and others similarly situated to divorce themselves totally from the direct operation of retail service station business. Kayo has been in the retail service station business in Maryland for approximately ten years. No valid public purpose is serviced by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morale or welfare of the citizens of the State, nor does the Act contain any such findings.

13. By prohibiting refiners and producers from operating retail service stations, the Act will remove from the retail gasoline service station market a class of competitor which has become a significant competitive factor in said market; that of the company-operated retail service station which passes the savings realized by streamlined operations along to the consumer. Because of Kayo's national marketing concept, that of company owned and operated retail gasoline stations, the Act will have the effect of forcing Kayo to dispose of its Maryland stations to buyers who might not find it economically feasible to continue operating the sites as retail gasoline outlets. The loss of even part of Kayo's Maryland stations will adversely affect the public in that there will be fewer distribution points at which the motoring public can conveniently purchase gasoline for lower than average prices. Further, by removing producers and refiners from the retail gasoline market, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

14. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

15. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Conoco and its subsidiary, Kayo, the right to earn a reasonable rate of return on its investment and takes plaintiffs' property without compensation and for private use.

16. All Kayo's stations were either built or remodeled as limited service, company operated outlets and are wholly unsuitable for dealer operations which require facilities for storage of tires, batteries and accessory inventories as well as facilities for the repair and service of automobiles. Based upon these facts and Kayo's concept of operation, Kayo will not be able to operate these stations with dealers and will be forced to dispose of the stations.

The Act Constitutes an Unlawful Delegation of Authority

17. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit

reasonable exceptions to the divestiture dates after considering all of the relevant facts . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid plaintiffs from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

18. Paragraph F of the Act provides that every producer, refiner and wholesaler shall "apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." It is unclear what is encompassed by the term "apportion uniformly". The Act provides no guidance as to the meaning of the term "apportion uniformly". The ambiguity and vagueness of that term may produce results that it is unlikely that the Legislature wished to produce. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1973 Cumulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the term referred to, the Act is unconstitutionally vague.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

19. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory alloca-

tion of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

20. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10,

each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is preempted by them in accordance with 6(b) of the Emergency Petroleum Allocation Act of 1973.

21. Plaintiffs have no adequate remedy at law.

22. In view of the aforementioned allegations, an actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiffs declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiffs, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiffs, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/Wilbur D. Preston, Jr.

/s/Stanley B. Rohd

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ANSWER

(To Continental and Kayo Bill of Complaint)

Filed August 5, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief and each and every paragraph thereof, say:

1. They admit the allegations contained in the first sentence of paragraph 1. They have no knowledge of the allegations contained in the second sentence, however

they believe and therefore aver that Continental Oil Company ("Conoco") sells both premium and regular gasoline in the State of Maryland which is comingled under a terminal agreement with the Ashland Oil Company, and that since June 1, 1974, Conoco has entered into a terminal agreement with the Sun Oil Company to comingle unleaded regular gasoline. The Defendants deny the allegations contained in the third sentence of paragraph 1 that all of the gasoline sold by Conoco in Maryland is manufactured at Conoco's refinery at Westlake, Louisiana and state that Conoco has terminal and exchange agreements in Maryland with other oil companies and, therefore, its gasoline becomes fungible under the exchange agreements.

2. They admit the allegations contained in paragraph 2 except for the allegation that all of the gasoline sold by Kayo in Maryland has been refined at the Westlake refinery.

3. Answering paragraph 3, the Defendants state that Kayo's percentage of the Maryland market for the sale of gasoline and other petroleum products at the retail level is approximately one-half of one percent. The Defendants have no knowledge as to whether or not persons purchasing gasoline and other petroleum products from Kayo operate in interstate commerce.

4. The allegations contained in paragraph 4 are admitted, however, the Defendants state further that the reasons that Kayo can operate as a "low price marketer" are that it markets fungible gasoline and does not incur other cost factors such as providing service facilities, credit cards, advertising programs and additives.

5. They admit the allegations contained in paragraphs 5 through 10, inclusive.

6. They deny the allegations contained in paragraph 11 of said Bill, specifically answering:

(a) The Act bears a substantial relation to the economic welfare and continuing existence and employment of the independent retail service station dealers and their employees and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen. The Act reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State.

(b) The Act does not deny Plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

(c) The Plaintiff is one of the 21 major oil producing and refining companies in the United States which control virtually all of the production and refining of gasoline in the United States.

(d) The Act does not constitute a taking of plaintiff's property without compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

(e) The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the

Maryland Declaration of Rights and Article III of the Maryland Constitution.

(f) The Act is not so vague as to deny Plaintiff due process in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

(g) The Act does not discriminate against nor unduly burden interstate commerce so as to be invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

(h) The Act does not conflict with any Federal statute and, therefore, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

7.(a) They deny the allegations contained in the first sentence of paragraph 12 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) They admit the allegations in the second sentence of paragraph 12 of said Bill.

(c) They deny the allegations contained in the third and fourth sentences of paragraph 12. The Legislature, after hearing testimony of the tremendous financial influence and control exercised by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

8. They deny the allegations contained in paragraph 13 and state that Kayo can lease its service stations with the same type of operation on a profitable basis and

further state that, in fact, other major oil companies at the present time are leasing service stations that employ the same type of operation as Kayo company owned and operated stations.

9. They deny the allegations contained in paragraphs 14 and 15.

10. They deny the allegations contained in paragraph 16 and state that they are advised that there are responsible and experienced independent retail service station dealers who are prepared to operate Kayo outlets on the same concept of operation as that employed by Kayo upon what they believe will be a profitable basis for Kayo and themselves.

11. They admit the allegations contained in the first two sentences of paragraph 17 and deny the allegations contained in the third and fourth sentences of paragraph 17.

12. They admit the first sentence in paragraph 18 and deny the remainder of the paragraph. The Defendants state further that the purpose of Paragraph F of the Act is to insure that all independent retail service station dealers have an equal share of gasoline during periods of shortages.

13. They admit the allegations contained in paragraph 19.

14. They admit the allegations contained in paragraph 20 to the extent that Paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

15. They admit the allegations contained in paragraphs 21 and 22.

Further answering:

16. They state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the monopolistic and anticompetitive control by the vertically integrated petroleum producer and refiner in the retail market.

17. They state that the tremendous financial power of the vertically integrated producers and refiners permit them to merge the monopolistic and competitive levels of the petroleum industry and to subject independent retail service station dealers to price squeezes and unfair competitive pressure which they have neither the resources nor capacity to resist.

18. They state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Conoco can maximize the profits earned at the noncompetitive and less competitive levels.

19. They state that price wars and the tremendous financial power of the petroleum producers and refiners such as Conoco have led to economic chaos in the retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

20. They state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Conoco can compete at several levels and compete over a wide range of territory and thus

compensate for losses at a particular level or in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level that would otherwise have existed.

21. They state that while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. The producers and refiners such as Conoco have concentrated on developing company owned and operated retail outlets that can pump high gallonage and abandoned low gallonage retail stations to the detriment of the general public in certain geographical areas.

22. They state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1973 and that there were 303 fewer service stations to serve the public at the end of the same period.

23. They state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/Francis B. Burch
Attorney General

/s/Jon F. Oster
Assistant Attorney General

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

No. 22,216

Shell Oil Company,

Plaintiff,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,

Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed September 3, 1974

Shell Oil Company ("Shell") brings this civil action against the above-named defendants and complains and alleges as follows:

I.

Parties

1. Plaintiff Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas. Plaintiff is a producer of crude oil and a refiner of petroleum products and operates with company personnel a retail service station in the State of Maryland. Shell owns, has adopted and uses in commerce the federally registered trademark of "Shell." Shell is authorized to do business in the State of Maryland and is a supplier of gasoline and other petroleum products in

Maryland, selling to motorists, other consumers, dealers, wholesalers, and others. All of the gasoline sold by Shell in Maryland is transported into the State in a continuous flow of interstate commerce from refineries located outside the boundaries of the State.

2. Shell sells quantities of gasoline and other petroleum products and other goods and services at retail to motorists and other consumers both in local Maryland markets and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, who use such petroleum products in interstate or foreign commerce with Maryland.

3. There are approximately 196 independent dealer stations in Maryland buying Shell branded gasoline directly from Shell. In addition, Shell has one (1) company-operated service station. This station required a large initial capital investment in land, building and equipment and this investment must be continuously sustained. In addition to marketing gasoline, this company-operated station sells automobile products, such as tires, batteries and accessories.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the

sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

II.

Jurisdiction and Venue

7. The jurisdiction of this Court is invoked under the Uniform Declaratory Judgment Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act.

8. Defendants Marvin Mandel and Louis L. Goldstein have their places of business and official residences in Anne Arundel County and, therefore, venue is proper in this Court pursuant to Section 6-201 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition).

III.

Nature of the Controversy

9. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland §157U (1957 Edition, as amended), provides for the regulation of the sale of

petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunctive against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

10. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

11. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland 1974 (the "Act"). A copy of the Act is attached hereto as Exhibit A. The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

12. If the Act is not declared unconstitutional, Shell and its officers, agents and employees will be subject to criminal prosecution in Maryland because of its aforementioned operation. Alternatively, Shell will be unable to continue in the business of selling petroleum products at retail in Maryland and it will be required to close or to seek to dispose of or to lease its Maryland facility. In addition, Shell, although having no present intention of converting all or any part of its independent lessee stations to company-operated facilities, does have plans to build large costly innovative units in Maryland which can be effectively operated only as company operated stations. The Act not only will prohibit the evolution of such plans, but, more significantly, it will totally eliminate Shell's retail competition in the Maryland markets and it will be harmful to the interests of both Maryland motorists and petroleum product consumers in interstate or foreign commerce who are required to purchase such products in Maryland. Shell accordingly has an actual and present need for the declaratory and injunctive relief which is sought herein. Shell has no adequate remedy at law.

IV.

Constitutional Defects In the Act

13. In prohibiting producers and refiners from opening and operating after July 1, 1974, and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act requires plaintiff and others similarly situated to divorce themselves from the retail service station business. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or

by restricting free and open competition. There is no basis to support the proposition that the operation of retail service stations by refiners or producers has anticompetitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings. On the contrary, such operations enhance competition and a denial of this right will lessen competition to the detriment of the consumer and contrary to the public policy of both the State of Maryland and the United States. It is only through a network of dealer operated service stations as supplemented by company operated stations that the consumer will receive those benefits which can only result from such complementary systems of distribution.

14. The Act bears no substantial relation to the health, safety, morals or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature. It is an improper and invalid exercise of the police power of the State and denies to Shell due process of Law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

15. The Act goes far beyond what is required in order to meet any possible proper legislative objectives such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers; indeed, its primary purpose is to restrict competition. Existing state and federal law provide for far less restrictive alternatives for achieving any such legitimate objective of this legislation, and this legislation is contrary to the purpose and spirit of other legislation designed to promote competition. The Act is not only unreasonable and unduly oppressive, but it is patently

beyond any legitimate necessities. Thus, the means selected by the Legislature bear no real and substantial relationship to any legitimate object sought to be obtained.

16. The Act discriminates against refiners and producers and prohibits them from engaging in certain lawful business activities, i.e., from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent while other major elements of the petroleum industry, all business entities who sell petroleum products but are not producers or refiners, and all other business entities are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

17. The Act, by regulating certain business and distribution practices of refiners, producers and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

18. The Act contains classifications, applications, and distinctions which are arbitrary, capricious, and without reasonable basis in law or in fact, in that, among other things:

(a) it precludes producers and refiners, and their subsidiaries, from engaging in retail sale of their petroleum products whereas all other persons and business entities may engage in retail sale of their own products;

(b) it allows producers and refiners, and their subsidiaries, to operate their retail service stations under a tertiary brand;

(c) it allows producers and refiners, and their subsidiaries, to sell unlimited amounts of gasoline and petroleum products to retail bulk purchase accounts, such as the State, other governmental units and private business, and thereby does not limit such retail sales to consumers; and

(d) it prohibits independent refiners and producers, among others, from entering into the retail service station market and independent marketers, among others, from entering into production and refining.

The Act denies to plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

19. By prohibiting refiners and producers from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act removes a class of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing such producers and refiners from the retail gasoline market and by requiring producers, refiners and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is restricted in fact by the Act, contrary to federal legislation such as Section 2(b) of the Robinson-Patman Act, for the benefit of some dealers.

20. The Act constitutes a taking of part or all of plaintiff's substantial investment in its retail service station business and a part or all of its return on investment without just compensation and for private use in violation of Article 23 of the Maryland Declaration of Rights, Article III, Section 40 of the Maryland Constitution and the Fourteenth Amendment to the United States Constitution.

21. By prohibiting refiners and producers from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, the Act not only establishes an arbitrary divorcement date, but also denies Shell the right to earn a reasonable rate of return on its investment and takes Shell's property without compensation and for private use.

22. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Shell from engaging in a lawful business; yet the delegated authority does not extend to a situation such as an independent dealer unexpectantly leaving a station with the result that both the consumer, through inconvenience and disruption of service, and the incoming dealer, through loss of clientele, incur hardship and economic loss due to the temporary but now

necessary closing of the station. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and denies to Shell due process of law in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

23. The Act is so vague and ambiguous that plaintiff cannot determine whether it is subject to violation of the criminal provisions applicable to the Act. Therefore, plaintiff is denied due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

24. Paragraph B of the Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

Paragraph C of the Act provides:

> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

Nowhere within these paragraphs or the Act are the terms "major brand", "secondary brand", "unbranded", "service station", and "subsidiary company" defined.

The ambiguity and vagueness of these terms is demonstrated, *inter alia*, by the question of whether "service station" is limited to those stations which have available vehicular related services, such as repairs and

accessories, or includes those stations which merely provide gasoline facilities or those stations which provide gasoline facilities, but derive the major percentage of their revenue from the sale of groceries or other nonpetroleum related products. In light of the criminal and civil penalties imposed for violations of the Section, and the vague and ambiguous terms identified herein, paragraphs B and C of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

25. Paragraph D of the Act provides:

> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

Paragraph E of the Act provides:

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

Nowhere within these paragraphs or the Act are the terms "voluntary allowances", "equipment rentals", "uniformly" and "retail service station dealers supplied" defined.

The ambiguity and vagueness of these terms is demonstrated, for example, by the question of whether "equipment rentals" is limited to include hand tools or storage tanks or gasoline pumps or lifts or the entire service station facility; whether "voluntary allowances" encompasses the granting of rent relief to a dealer so that he may avoid the full economic impact of a temporary road closing or a fire which temporarily prevents

acceptance of repair work; whether "uniformly" is to be measured in terms of cents per gallon or a strict monetary basis per item of equipment; whether "uniformly" is used in the context of the various stratas of retail operations, that is in the relationship to the comparison between a sparcely patronized single pump operation and a sophisticated, high volume operation; and in other respects. The ambiguity and vagueness of these terms may produce results that it is unlikely the Legislature wished to produce. In light of the criminal and civil penalties imposed for violations of the Act and the vague and ambiguous terms identified herein, paragraphs D and E of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

26. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

27. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here) (emphasis added). Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in §212.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery. (Emphasis added)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly", is, therefore, in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

28. Under 10 C.F.R. §210.62 of the Petroleum Allocation and Price Regulations, it is provided that a supplier may not "modify any . . . normal business practice so as to result in circumvention of any provision of this chapter." Compliance with the requirements of paragraph D of the Act would be a deviation from Shell's normal business practices and would have the effect of frustrating or impairing the objectives and the implementation of the Act which provides for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. Therefore, paragraph D is in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

29. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other.

Under 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO, a scheme is established for petroleum

allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation of different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulation. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO.

Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with section 6(b) of the Emergency Petroleum Allocation Act of 1973 and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

30. The requirement of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to

all retail service station dealers supplied" conflicts with both the spirit and the language of the Robinson-Patman Act, 15 U.S.C. §13, and the Maryland antitrust laws, Article 83, Section 38, Annotated Code of Maryland (1973 Cumulative Supplement). Under both the federal and state antitrust laws, unlawful price discrimination can only result from a price difference which adversely affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis regardless of any rationale or justified geographic basis. This provision of the Act is, therefore, in conflict with and preempted by the federal law and it is invalid under Article VI, Clause 2 of the Constitution of the United States.

31. Under the Lanham Act, 15 U.S.C. §1051, Congress fully regulated the registration and use of trademarks in interstate and foreign commerce. It expressed its intention "to protect registered marks used in such commerce for interference by State, or territorial legislation" 15 U.S.C. §1127. Congress also exhausted its constitutional powers in the regulation of trademarks when it defined "commerce" for purposes of the Lanham Act as meaning "all companies which may lawfully be regulated" 15 U.S.C. §1127. Thus, Congress has manifested its intention to use its complete power under the Commerce Clause of the United States Constitution to regulate and protect trademarks and it has expressly prohibited any interference by state action within that field. The Act, which prohibits Shell from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent, is preempted by the federal law and is invalid under Article VI, Clause 2 of the Constitution of the United States.

32. The Lanham Act, under 15 U.S.C. §1057, provides the registrant of a trademark with the exclusive

right to use the mark in commerce. The Act deprives Shell of the right to use the "Shell" trademark, which it owns, uses and has adopted, to open and operate after July 1, 1974 and operate after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent. The Act thereby conflicts with the Lanham Act and, therefore, it is invalid under Article VI, Clause 2 of the Constitution of the United States.

33. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article 1, Section 8 of the United States Constitution. The excessive burden and discrimination are demonstrated by, among others, the following examples: the Act prohibits producers and refiners from entering the retail gasoline market in Maryland while at the same time it prevents a retail gasoline company in Maryland from entering into production or refining anywhere; the Act will cause a displacement of market share from Shell and others similarly situated to those companies not prohibited from engaging in the retail service station business; and the Act, by freezing and sterilizing the retail gasoline market, will reduce or eliminate, to the detriment of the consumer, those benefits accorded through a fully competitive market system.

34. The Act places unconstitutional conditions on doing business in the State of Maryland in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

35. In view of the aforementioned allegations, an actual controversy exists between the parties, antagonistic claims are present between the parties and immediate and irreparable injury, loss and damage will result to Shell

unless the defendants are preliminarily enjoined from enforcing the Act until there is a final determination of this lawsuit. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Shell respectfully prays that this Court

(a) Assume jurisdiction over the parties hereto and the subject matter hereof;

(b) Enter a judgment and decree declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid and of no force and effect;

(c) Issue a temporary injunction *pendte lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

(d) Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act; and

(e) Grant such other and further relief as shall be deemed necessary and appropriate.

/s/ William Simon,
/s/ Robert G. Abrams,
Howrey, Simon, Baker & Murchison,
/s/ George W. Shadoan,
Shadoan & Mack,

ANSWER

(To Shell Bill of Complaint)

Filed October 22, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, and John A. Woodstock, Assistant Attorneys General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit the allegations contained in paragraph 1.

2. That they admit that Shell sells gasoline and other petroleum products at the retail level in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they admit the allegations contained in paragraph 3 but are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit this Court has jurisdiction under the Uniform Declaratory Judgment Act as alleged in paragraph 7.

6. That they admit the allegations contained in paragraphs 8 through 11, inclusive.

7. That they admit that if Shell does not comply with the provisions of the Act, Shell will be subject to

criminal prosecution but deny the allegations contained in the second and fourth sentences of paragraph 12. They are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 12. They admit the allegations contained in the fifth sentence of paragraph 12.

8. (a) That they deny the allegations contained in the first sentence of paragraph 13 and state that paragraphs (B) and (C) of Chapter 854 prevent a producer or refiner from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged.

(b) That they deny the allegations contained in the second through fourth sentences of paragraph 13. The Legislature, after hearing testimony of the tremendous financial influence and control exercised by the producers and refiners over the operation of retail service stations has deemed that it is in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

9. That they deny the allegations contained in paragraph 14 of said Bill, specifically answering:

(a) That the Act bears a substantial relation to the economic welfare and continuing existence of the retail service station dealers and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate

objective of the Legislature and a valid exercise of the police power of the State and does not deny to Shell due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

10. That they deny the allegations contained in paragraph 15.

11. That they deny the allegations contained in paragraphs 16, 17 and 18, specifically answering that the Act does not deny plaintiff equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution because the classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman.

12. That they deny the allegations contained in paragraph 19.

13. That they deny the allegations contained in paragraph 20, specifically answering that the Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

14. That they deny the allegations contained in paragraph 21.

15. That they admit the allegations contained in the first two sentences of paragraph 22 and deny the allegations contained in the third and fourth sentences of paragraph 22.

16. That they deny the allegations contained in paragraph 23, specifically answering that the Act is not so vague as to deny plaintiff due process in violation of

Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

17. That they admit the allegations contained in paragraph 24 as to the provisions of the Act but deny that the Act is so vague as to deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

18. That they admit the allegations contained in the first two sentences of paragraph 25 as to the provisions of the Act. That they admit the allegations of the third sentence of paragraph 25 in that the terms "voluntary allowances", "equipment rentals", "uniformly", and "retail service station dealers supplied" are undefined by the Act, but deny that such terms are unclear as alleged in the fourth, fifth and sixth sentences of paragraph 25 of said Bill.

19. That they admit the allegations contained in paragraph 26.

20. That they admit the allegations contained in the first five sentences of paragraph 27 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 27 of said Bill because the effect of the federal regulations is to make any allowance extended by Shell to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act.

21. That they deny the allegations contained in paragraph 28 as to any conflict between the Act and

10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requiremnt of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n]o supplier shall engage in any form of discrimination among purchasers of any allocated product."

22. That they admit the allegations in paragraph 29 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act.

23. That they deny the allegations in paragraph 30 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83 §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anticompetitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

24. That they admit the allegations contained in paragraphs 31 and 32 as to the provisions of the Lanham Act but deny that there is any conflict between the provisions of that Act and the Maryland Act.

25. That they deny the allegations contained in paragraphs 33 and 34.

26. That they admit the allegations contained in paragraph 35 of the Bill.

Further answering:

27. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

28. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Shell can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

29. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently companies such as Shell can afford to conduct their retail operation at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

30. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Shell have led to economic chaos in the

retail service station business and impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

31. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Shell can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars the turnover ratio and failure ratio of retail service station dealers is higher than any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a level than would otherwise have existed.

32. That they state that in this State the Gasoline Tax Division of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972 through December 31, 1971 and that there were 303 fewer service stations to serve the public at the end of the same period.

33. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems, lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Comptroller of the Treasury to undertake a study of the retail gasoline situatio.. during June, July and August 1973. The Gasoline Tax Division found that the retail service stations that were company owned and operated had no

difficulty in securing the gasoline they could sell whereas other retail dealers were not supplied with all of the gasoline they could sell. The Gasoline Tax Division also found that certain producers and refiners other than Shell had terminated leases of retail dealers and converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should not be issued, the Defendants respectfully pray that any stipulations entered into by either party pursuant to this action be vacated and that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General,

/s/ John A. Woodstock,
Assistant Attorney General,
Attorneys for Defendants.

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AMENDMENT TO ANSWER

(To Shell Bill of Complaint)

Filed October 25, 1974

[Caption Omitted in Printing]

The Defendants, Governor of Maryland, Attorney General of Maryland and Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, and John A. Woodstock, Assistant Attorneys General, amend their Answer to the Bill For Declaratory Judgment and Injunctive Relief previously filed in this Court to state:

1. That they admit the allegations contained in the sixth sentence of paragraph 12.

2. That, for the reasons stated in paragraph 8(b) of their previously filed answer, they also deny the allegations contained in the fifth sentence of paragraph 13 of plaintiff's Bill of Complaint.

3. That they deny the allegations contained in paragraph 20, specifically answering that the Act does not constitute an unlawful taking of property in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

/s/ Francis B. Burch,
Attorney General,

/s/ Jon F. Oster,
Assistant Attorney General.

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,461

Gulf Oil Corporation,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed January 23, 1975

Gulf Oil Corporation ("Gulf"), plaintiff herein, by its attorneys, brings this action under the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Gulf declares and alleges as follows:

The Parties

1. Gulf, a Pennsylvania corporation, is a producer and refiner of petroleum products, owns and operates

one retail service station in the State of Maryland, and anticipates owning and operating additional retail service stations in the State of Maryland. Gulf has done business in Maryland for more than thirty years, and believes it is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public and others approximately nine percent of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the boundaries of the state.

2. Gulf sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail and wholesale levels both in local markets in Maryland and to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

3. There are approximately 221 independent dealer stations in Maryland buying Gulf branded gasoline directly from Gulf, of which approximately 105 lease stations from Gulf and 116 own their own stations or lease them from parties other than Gulf. The present and anticipated company-operated stations in addition to marketing gasoline, sell and anticipate selling automobile products, such as tires, batteries and accessories, and provide and anticipate providing a complete range of automobile maintenance and repair services, and require and anticipate requiring large initial and sustained capital investment in land, buildings and equipment.

4. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> "(b) Whenever the Comptroller of the Treasury shall find any person . . . willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court

having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require."

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant acts and reaching reasonable conclusions based upon those facts.

Constitutional Defects in the Act

10. As more fully set forth below, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. The Act bears no substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of the Legislature and therefore goes beyond the police power of the State and denies to Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from

engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers, without regulating the same practices by other persons or business entities, denies plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of plaintiff's substantial investment of its retail service station and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of the Treasury by the Act affords no protection to the plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraphs B and C of the Act conflict with the overriding federal antitrust policy of imposing restraints or divestitute only *after* a judicial showing of a specific violation, and therefore, is preempted by federal antitrust laws under the Supremacy Clause of Article VI of the United States Constitution.

j. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

k. Paragraphs D, E and F of the Act constitute a law impairing the obligation of contracts in violation of Article I, §10 of the United States Constitution.

The Act Denies Plaintiff Due Process of Law and is Discriminatory

11. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974, and in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires plaintiff and others similarly situated to divorce themselves totally from the retail service station business. Plaintiff has been in the retail service station business in Maryland for over 30 years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no probative evidence to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

12. By prohibiting refiners and producers from operating retail service stations, the Act removes a class of competitor from not only the retail gasoline service station market, but also the increasingly significant automobile service and repair market and the retail market for such products as tires, batteries, and automobile accessories. Further, by removing producers and refiners from the retail gasoline market and by requiring producers, refiners, and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all retail service station dealers across the State, regardless of the relevant trading area, the opportunity for normal and lawful price competition is in fact restricted by the Act for the benefit of some dealers.

13. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Existing state and federal law, including other legislation enacted at the 1974 Session of the General Assembly (see Chapter 852), provide for far less restrictive alternatives for achieving any such legitimate objective. Thus, the means selected by the General Assembly bear no real and substantial relationship to any legitimate object sought to be obtained.

The Act Constitutes an Unconstitutional Taking

14. By prohibiting refiners and producers from operating service stations in the State of Maryland, the Act denies Gulf the right to earn a reasonable rate of return on its investment and takes Gulf's property without compensation and for private use.

15. The Act establishes an arbitrary July 1, 1975 divestiture date, within which one-year period Gulf believes that it will be difficult, if not impossible, to enter into a satisfactory contractual arrangement. Gulf will lose substantial portions of its investment if it is forced to close its company-operated service station before a satisfactory arrangement with a dealer can be worked out.

The Act Constitutes an Unlawful Delegation of Authority

16. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previ-

ously dealer-operated station." Paragraph H of the Act delegates the Comptroller the power to "permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Gulf from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

The Act is Unconstitutionally Vague

17. Paragraph B of the Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

Paragraph C of the Act provides:

> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

Nowhere within these paragraphs or the Act are the terms "major brand", "secondary brand", "unbranded", "service station", and "subsidiary company" defined.

The ambiguity and vagueness of these terms is demonstrated, *inter alia*, by the question of whether "service station" is limited to those stations which have available vehicular related services, such as repairs and

accessories, or includes those stations which merely provide gasoline facilities or those stations which provide gasoline facilities, but derive the major percentage of their revenue from the sale of groceries or other non-petroleum related products. In light of the criminal and civil penalties imposed for violations of the Section, and the vague and ambiguous terms identified herein, paragraphs B and C of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

18. Paragraph D of the Act provides:

> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

Paragraph E of the Act provides:

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service stations dealers supplied.

Paragraph F of the Act provides:

> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

Nowhere within these paragraphs are the terms "retail service station dealers", "voluntary allowances", "equipment rentals", "uniformly" and "retail service station dealers supplied" defined.

The ambiguity and vagueness of these terms is demonstrated, for example, by the question of whether "equipment rentals" is limited to include hand tools or storage tanks or gasoline pumps or lifts or the entire service station facility; whether "voluntary allowances" encompasses the granting of rent relief to a dealer so that he may avoid the full economic impact of a temporary road closing or a fire which temporarily prevents acceptance of repair work; whether "uniformly" is to be measured in terms of cents per gallon or a strict monetary basis per item of equipment; whether "uniformly" is used in the context of the various stratas of retail operations, that is in the relationship to the comparison between sparcely patronized single pump operation and a sophisticated, high volume operation; and in other respects. The ambiguity and vagueness of these terms may produce results that it is unlikely the Legislature wished to produce. In light of the criminal and civil penalties imposed for violations of the Act and the vague and ambiguous terms identified herein, paragraphs D, E and F of the Act deny plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act is Preempted by the Federal Emergency Petroleum Allocation Act of 1973

18. Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Act also contains a preemption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Administration, formerly called the Federal Energy Office (the "FEO"), pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

19. Under 10 C.F.R. §212.82(f) and §212.93(a) of the Petroleum Allocation and Price Regulations, the base price for sales for both refiners and resellers "is the weighted average price at which the item was lawfully priced in transactions with the *class of purchaser* concerned on May 15, 1973" (with adjustments not pertinent here). (Emphasis added.) Sections 212.82(f) and 212.93(d) provide that in computing the base price charged to a "class of purchaser" a refiner or reseller "may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." "Class of Purchaser" is defined in §212.31 to mean:

> purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between these purchasers or lessees and other purchasers or lessees.

"Customary price differential" includes:

> a price distinction based on a discount, *allowance*, add-on, premium, and an extra base on a difference in volume, grade, quality, or location or type of

purchaser, or a term or condition of sale or delivery. (Emphasis added.)

The Regulations thus expressly require refiners and sellers to reflect any allowances in effect on May 15, 1973 in determining the base price charged to their purchasers, and the Regulations expressly sanction price differentials and different allowances based on such differences as volume, location, or type of purchaser. The requirement of Paragraph D of the Act, amending Article 56, §157E, that all voluntary allowances be extended "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

20. Under 10 C.F.R. §210.62 a supplier may not "modify any . . . normal business practice so as to result in circumvention of any provision of this chapter." The granting of legally sanctioned price differentials and allowances is a normal business practice. Compliance with Paragraph D's requirement that allowances be extended uniformly would, therefore, be a deviation from a normal business practice and would have the effect of frustrating or impairing the objectives of the Regulations to the extent that the price differentials and allowances are part of the mechanism sanctioned by the Regulations for controlling the price of petroleum products. Therefore, Paragraph D is in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

21. Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, shall, to the maximum extent practicable, provide for, among other factors,

preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile, to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended, 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEO establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logistics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base price and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEO Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a state Office of Petroleum Allocation which can operate under authority delegated by the FEO. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. The requirement of

Paragraph F of the Act amending Article 56, §157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with and preempted by the Regulations in accordance with §6(b) of the Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

The Act Conflicts With
Federal Antitrust Laws

22. Paragraphs B and C of the Act, are, in substance, antitrust laws purportedly directed at enhancing competition in the retail sale of petroleum products and the elimination of alleged trade abuses. As such, Paragraphs B and C conflict with the overriding policy in the Sherman Antitrust Act, 15 U.S.C. §§1-7, Clayton Antitrust Act, 15 U.S.C. §§12-27, and Robinson-Patman Act, 15 U.S.C. §13, of imposing restraints or divestiture only *after* a judicial showing of a specific antitrust violation or threatened violation. No such showing has been made, and, therefore, the Act is in conflict with and preempted by the federal antitrust laws.

The Act Conflicts with the
Robinson-Patman Act, 15 U.S.C. §13

23. The requirements of Paragraph D of the Act that all producers, refiners, and wholesalers of petroleum products "extend all voluntary allowances uniformly to all retail service station dealers supplied" conflicts with both the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) (part of the Maryland antitrust law). Under both the federal and state antitrust laws, unlawful price discrimination can only result from a price difference which adversely

affects competition. Paragraph D of the Act requires all allowances to be made on a state-wide basis without reference to whether there is any adverse effect on competition and regardless of any rationale or justification for the granting of any form of allowance on a more limited geographic basis. Moreover, by creating an artificial state-wide market which totally ignores economic market areas which transcend state lines, Paragraph D of the Act violates the aforementioned laws either by (i) requiring producers, refiners and wholesalers of petroleum products to discriminate among retail service station dealers in the same economic market areas where such areas transcend state lines, or (ii) affecting interstate commerce by the *de facto* imposition upon other states of prices mandated by the Act. Therefore, the Act conflicts with and is preempted by the federal law.

The Act Impairs the Obligation of Contracts

24. The requirements of Paragraphs D, E and F of the Act to extend voluntary allowances uniformly, apply all equipment rentals uniformly, and apportion uniformly gasoline and special fuels during periods of shortages on an equitable basis without discrimination in allotments conflict or may conflict with pre-existing contracts between Gulf and numerous dealers. Therefore, Paragraphs D, E and F constitute a law impairing the obligation of contracts in violation of Article I, Section 10 of the United States Constitution.

25. Gulf has no adequate remedy at law, and will sustain irreparable injury in the absence of relief as herein prayed.

26. In view of the aforementioned allegations, an actual controversy exists between the parties and

antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Gulf respectfully prays that the Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down for prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award plaintiff declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the plaintiff, the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

/s/Donald N. Rothman

/s/Lawrence S. Greenwald

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Attorneys for Plaintiff

ANSWER

(To Gulf Bill of Complaint)

Filed February 3, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit that Gulf is a Pennsylvania corporation, that it is producer and refiner of petroleum products, and that it owns and operates one retail service station in the State of Maryland, but are without knowledge and information sufficient to form a belief as

to the truth of the remaining allegations contained in paragraph 1.

2. That they admit that Gulf sells gasoline and other petroleum products and other goods and services at the retail and wholesale levels in Maryland, but are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2.

3. That they are without sufficient information and belief as to the truth of the allegations contained in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit the allegations contained in paragraphs 7 through 9, inclusive.

6. That they deny the allegations contained in paragraph 10, specifically answering:

That the Act bears a substantial relation to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a substantial relation to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State and does not deny to Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act does not deny Gulf and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman. The classification of producers, refiners, and wholesalers is a reasonable classification and bears a rational relationship to a legitimate state purpose in regulating gasoline pricing and distribution practices in Maryland.

The Act does not constitute a taking of part or all of Gulf's substantial investment in its retail service station and a part or all of its return on investment without just compensation and for private use in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act is not so vague and ambiguous as to deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

Defendants admit that paragraph F of the Act may conflict with the Federal Emergency Petroleum Act of 1973 and that it may be invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs B and C of the Act do not conflict with federal antitrust policy and, accordingly, are not pre-empted by the federal antitrust laws under the Supremacy Clause of Article VI of the United States Constitution.

Paragraph D of the Act does not conflict with the Robinson-Patman Act, 15 U.S.C. §13, and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs D, E, and F of the Act are not in violation of Article I, §10 of the United States Constitution.

7. That they deny the allegations contained in paragraphs 11 through 13, inclusive. They further state that paragraphs B and C of the Act prevent producers or refiners from operating a retail service station but do not require that they "divorce themselves totally from the retail service station business" as alleged. They further state that the Legislature, after hearing testimony of the tremendous financial influence and control exercised by producers and refiners over the operation of retail service stations, deemed that it was in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

8. That they deny the allegations contained in paragraph 14.

9. That they admit that the Act establishes July 1, 1975 as the "divestiture date", but deny the remaining allegations of paragraph 15.

10. That they admit the allegations contained in the first two sentences of paragraph 16, but deny that the discretion granted to the Comptroller is unlimited and further deny that it constitutes an unlawful delegation of legislative authority and a denial of due process of law. They deny that paragraph H of the Act is void.

11. That they admit the allegations contained in paragraph 17 as to the provisions of the Act, but deny that the Act is so vague as to deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

12. That they admit the allegations contained in the first three sentences of the first paragraph 18 as to the provisions of the Act. That they admit the allegations of the fourth sentence of said first paragraph 18 in that the terms "retail service station dealers", "voluntary allowances", "equipment rentals", "uniformly", and "retail service station dealers supplied" are undefined by the Act, but deny that such terms are unclear as alleged in the remaining sentences of said first paragraph 18 of said Bill. They further deny that paragraphs D, E, and F of the Act deny Gulf due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

13. That they admit the allegations contained in the second paragraph 18.

14. That they admit the allegations contained in the first five sentences of paragraph 19 as to the provisions of the Petroleum Allocation and Price Regulations but deny the allegations contained in the last sentence of paragraph 19 of said Bill because the effect of the federal regulations is to make any allowance extended by Gulf to any "class of purchaser" on said date mandatory for the duration of the regulations. Section D of the Act refers solely to voluntary allowances and thus there is no conflict and no preemption under Section 6(b) of the Federal Emergency Petroleum Act and Article VI, Clause 2 of the United States Constitution.

15. That they deny the allegations contained in paragraph 20 as to any conflict between the Act and 10 C.F.R. §210.62. The complete sentence from which plaintiff has extracted its quotation is as follows:

> "However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this Chapter."

They also deny that the uniformity requirement of paragraph D of the Act in any way conflicts with 10 C.F.R. §210.62 because paragraph (b) of that regulation requires in part that "[n] o supplier shall engage in any form of discrimination among purchasers of any allocated product."

16. That they admit the allegations in paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act of 1973 and Article VI, Clause 2 of the United States Constitution.

17. That they deny the allegations contained in paragraph 22 of the Bill.

18. That they deny the allegations in paragraph 23 and say that the precise terms of paragraph D of the Act do not conflict with the spirit and the language of 15 U.S.C. §13 (the Robinson-Patman Act) and Article 83, §38, Annotated Code of Maryland (1973 Cumulative Supplement) which prohibit anticompetitive pricing and practices. The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

19. That they are without knowledge and information sufficient to form a beiief as to the truth of the allegations contained in the first sentence of paragraph 24 of the Bill. They deny the allegations contained in the second sentence of said paragraph 24.

20. That they admit the allegation in paragraph 25 that Gulf has no adequate remedy at law but deny that Gulf will sustain irreparable injury in the absence of the relief requested.

21. That they admit the allegations contained in paragraph 26 of the Bill.

Further answering:

22. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market.

23. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Gulf can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

24. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Gulf can afford to conduct

their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

25. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Gulf have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

26. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Gulf can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

27. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

28. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands. The Gasoline Tax Division also found that certain producers and refiners other than Gulf had terminated leases of retail dealers and had converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of 1974 should be issued, the Defendants respectfully pray that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/Francis B. Burch

Attorney General of Maryland

/s/Jon F. Oster

Deputy Attorney General

/s/John A. Woodstock

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Attorneys for Defendants

[Certificate of Service Omitted in Printing]

In the Circuit Court for Anne Arundel County

Equity No. 22,502

Phillips Petroleum Company,
Plaintiff,

v.

Marvin Mandel, Governor, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed February 14, 1975

Phillips Petroleum Company ("Phillips"), Plaintiff herein, by its attorneys, J. Edward Davis and Edward J. Smith, Jr., brings this action under the Uniform

Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional and invalid and to obtain injunctive relief against the Defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. In support thereof, Plaintiff alleges as follows:

1. Phillips, a Delaware corporation, is a producer and refiner of petroleum products which is duly authorized to do business in the State of Maryland. In the course of its business, Phillips regularly sells gasoline and other petroleum products to jobbers, independent dealers and consumers generally in Maryland. All of the gasoline sold by Phillips in Maryland is transported into Maryland in interstate commerce from refineries located outside of Maryland.

2. There are approximately one hundred twenty one (121) marketing outlets in Maryland for the retail sale of Phillips' brands of gasoline and other petroleum products. Approximately one hundred and eight (108) of these outlets are service stations operated by persons or companies who are not Phillips Company personnel, subsidiaries or commissioned agents, but who buy gasoline and other petroleum products from Phillips for retail sale. The remaining thirteen outlets are service stations operated by salaried personnel of Phillips.

3. Each of the thirteen company-operated service stations of Phillips located within Maryland required a

large initial capital investment by Phillips in land, buildings and equipment, which investments must be continuously sustained.

4. The Defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

5. The Defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek injunctions against the persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

6. The Defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

7. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157B, the Comptroller of the Treasury administers the provisions of the Motor Fuel Inspection Law. He is authorized to promulgate rules and regulations for the administration and enforcement of the Subtitle. Section 157B provides further with respect to enforcement of the Subtitle:

> (b) Whenever the Comptroller of the treasury shall find any person. . .willfully marketing petroleum products in violation of this article and rules and regulations promulgated pursuant hereto, he shall direct them to cease such violation. If, after such direction, the violation continues, the Comptroller shall refer the matter to the Attorney General who is authorized to apply to the circuit court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate circuit court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require.

8. Article 56, §157F(g), imposes criminal penalties for violation of the Subtitle. One who violates any provision of the Subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months or by both fine and imprisonment.

9. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974 and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"). A copy of the Act is attached hereto as Plaintiff's *Exhibit No. 1.* The Act became effective July 1, 1974 and amended Article 56, §157E by adding to §157E the following provisions:

> (b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland and operate it with company personnel, a subsidiary company, or a commissioned agent.
>
> (c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand,

secondary brand, or unbranded retail service station in the State of Maryland with company personnel, a subsidiary company, or a commissioned agent.

(d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(e) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers suplied.

(f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(g) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(h) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

10. As more fully set forth below in paragraphs 12 through 22, Chapter 854 of the Laws of Maryland of 1974 is unconstitutional.

a. The Act bears no real and substantial relation to the health, safety, morals, or welfare of the people of the State of Maryland or to any other legitimate objective of

the Legislature and therefore goes beyond the police power of the State and denies to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. The Act singles out refiners and producers of petroleum products and totally prohibits them from engaging in certain lawful business activities, i.e., the retail sale of gasoline, while other major elements of the oil industry who are not refiners or producers, and all other business entities, are not subject to the prohibitions of the Act. The Act thus denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

c. The Act, by regulating certain pricing and distribution practices of producers, refiners, and wholesalers of petroleum products, without regulating the same practices by other persons or business entities, denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

d. The Act constitutes a taking of part or all of Plaintiff's substantial investment in retail service stations and a taking of Plaintiff's property without just compensation in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

e. The failure of the Act to set forth any standards to guide the unlimited discretion granted the Comptroller of

the Treasury by the Act affords no protection to Plaintiff against arbitrary or unreasonable exercise of the Comptroller's authority and constitutes an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

f. The Act in several respects is so vague and ambiguous that there is virtually no way that Plaintiff can determine whether or not it is subject to violation of the criminal provisions which are applicable to the Act and, therefore, denies Plaintiff due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

h. Paragraph F of the Act conflicts with the Federal Emergency Petroleum Allocation Act of 1973 and is, therefore, invalid under the Supremacy Clause of Article VI of the United States Constitution.

i. Paragraph D of the Act conflicts with 15 U.S. Code, Section 13 (Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

11. As set forth above in paragraph 10, Phillips has an actual and present need for the declaratory and injunctive relief which is sought herein. Phillips has no adequate remedy at law.

12. In prohibiting producers or refiners from opening and operating retail service stations after July 1, 1974 and, in prohibiting producers or refiners from operating retail service stations after July 1, 1975, the Act requires

Plaintiff and others similarly situated to divorce themselves totally from the operation of retail service stations with their company personnel. The Act deprives Phillips of its property without due process of law and denies to Phillips its rights to do business without undue and unreasonable restrictions and regulation. Phillips has sold its refined petroleum products at retail in Maryland for approximately 12 years. No valid public purpose is served by eliminating the right of producers or refiners to engage in the lawful enterprise of operating retail service stations or by restricting free and open competition. There is no basis on which to support the proposition that the operation of retail service stations by refiners or producers has anti-competitive effects or otherwise adversely affects the health, safety, morals or welfare of the citizens of the State, nor does the Act contain any such findings.

13. By prohibiting refiners and producers from operating retail service stations, the Act removes a class of competitor from the retail service station market and thereby effectively precludes such companies not only from selling their refined petroleum products through their stations operated with their salaried employees but also from supplying or furnishing at retail other items of merchandise such as tires, batteries and accessories, and automobile service and repair work. The Act thus denies to the consuming public the opportunity of purchasing these necessary goods and services from producer or refiner-operated service stations.

14. The effect of the Act is to curtail normal competition in the retail service station market. Not only does it eliminate one class of competitor from the marketplace, to the advantage of those remaining in the market who are not subject to the Act, but also, by

requiring producers, refiners and wholesalers to extend all voluntary allowances and equipment rentals uniformly to all service station dealers supplied, the Act interferes with an retards normal, open and otherwise lawful, price competition.

15. The Act goes far beyond what is required in order to meet any possible proper legislative objective such as promotion of price competition, prevention of monopolies, or even protection to independent service station dealers from unreasonable or arbitrary termination. Thus, the means selected by the General Assembly bear no real substantial relationship to any legitimate object sought to be obtained. The Act is thus an improper and invalid exercise of the police power of the State and denies to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

16. The Act discriminates against refiners and producers and prohibits them from engaging in certain lawful business activities, i.e., from opening and operating after July 1, 1974 and operating after July 1, 1975 retail service stations with company personnel, a subsidiary company or a commissioned agent while other major elements of the petroleum industry, all business entities who sell petroleum products but are not producers or refiners or subsidiaries or commissioned agents thereof, and all other business entities are not subject to the prohibitions of the Act. The Act thus denies Plaintiff, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteeneth Amendment to the United States Constitution.

17. The Act establishes an arbitrary July 1, 1975 divestiture date, by which time Plaintiff believes it will not be possible to enter into satisfactory contractual arrangements with suitable dealers. In such event Plaintiff will thus lose substantial portions of its investment in those service stations which under the provisions of the Act, will have to be closed as of that date, unless the Comptroller should in his discretion permit such stations to continue operating.

18. By establishing an arbitrary divestiture date, the Act will require either the closing of the Company operated stations, or their lease or rental to other parties for operation which constitutes a taking of Plaintiff's property without compensation.

19. Paragraph G of the Act delegates to the Comptroller of the Treasury the power to adopt rules and regulations defining the circumstances in which a producer or refiner "temporarily may operate a previously dealer-operated station." Paragraph H of the Act delegates to the Comptroller the power to "Permit reasonable exceptions to the divestiture dates after considering all of the relevant facts. . ." Those delegations of authority contain no legislative guidelines and grant to the Comptroller unlimited discretion either to permit or forbid Plaintiff from engaging in a lawful business. The delegation of such unbridled authority to an executive or administrative official constitutes an unlawful delegation of legislative authority and a denial of due process of law and is void.

20. Paragraph D of the Act provides that every producer, refiner and wholesaler shall extend all "voluntary allowances uniformly to all retail service station dealers supplied." None of this critical language of the paragraph is defined and it is unclear what is meant by

the terms "voluntary allowances", "uniformly" and "all retail service station dealers". In addition Paragraph F of the Act provides that every producer, refiner and wholesaler shall "apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." It is unclear what is encompassed by the term "apportion uniformly" and the Act provides no guidance as to the meaning of the term "apportion uniformly". The ambiguity and vagueness of these terms may produce results that it is unlikely that the Legislature wished to produce. The Act is not sufficiently clear and certain so as to inform those subject thereto what conduct may render them liable to penalty. In light of the severe criminal penalties imposed by Article 56, §157F, Annotated Code of Maryland (1975 Cummulative Supplement), which are applicable to the Act amending §157E, and the vagueness of the term referred to, the Act is unconstitutionally vague.

21. (a) Section 4(a) of the Federal Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, directs the President of the United States to promulgate "a regulation providing for mandatory allocation of [petroleum products], in amounts. . . and at prices specified in (or determined in a manner prescribed by) such regulation." The Allocation Act also contain a pre-emption provision. Section 6(b) provides that:

> The regulation under section 4 and any order issued thereunder shall pre-empt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

The Petroleum Allocation and Price Regulations promulgated by the Federal Energy Office (the "FEO") pursuant to section 4(a) of the Act (39 Fed. Reg. 1923, as amended) establish a very detailed and comprehensive regulatory scheme governing the pricing and the allocation of the supply of petroleum products on a national scale.

(b) Section 4(b) of the Emergency Petroleum Allocation Act provides that the mandatory allocation regulation promulgated by the FEO, [now Federal Energy Administration], shall, to the maximum extent practicable, provide for, among other factors, preservation of an economically sound and competitive petroleum industry, equitable distribution of petroleum products at equitable prices, and the minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms. The Act thus requires the federal allocation mechanism to recognize and reconcile to the "maximum extent practicable," numerous factors which may, at times, conflict with each other. 10 C.F.R. §211 et seq. (as amended 39 Fed. Reg. 15959) of the Petroleum Allocation Regulations issued by the FEA establishes a scheme for petroleum allocation based on each supplier's total allocable supply for each allocated product and the base period volume for each purchaser of the supplier. Under 10 C.F.R. §211.10, each supplier's allocation fraction (which fraction varies for each supplier) is applied to the base period volume of each of the purchasers of the supplier. Sections 211.13 and 211.14 of the Regulations provide for adjustments to the amount of a petroleum product allocable to a purchaser, based on such factors as unusual growth, new customers, regional imbalances in the supply of petroleum products, and the need to allow suppliers some reasonable discretion and leeway in the logis-

tics of supply. Every pricing and allocation determination made pursuant to the Regulations, such as base prices, base period volumes, adjustments to base prices and base period volumes, and the reallocation to different regions or areas can be challenged by either the supplier or the purchaser through the FEA Regional Office by procedures detailed in the Regulations. Pursuant to §211.15, a state may create a State Office of Petroleum Allocation which can operate under authority delegated by the FEA. Thus, the basic allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency.

(c) The requirement of Paragraph F of the Act amending Article 56, § 157E, that petroleum products be apportioned "uniformly" is, therefore, in conflict with the Regulations and is pre-empted by them in accordance with 6(b) of the Emergency Petroleum Allocation Act of 1973. Further, the Emergency Petroleum Allocation Act and the regulations thereunder include pricing in the federal regulatory scheme and therefore, pre-empt the State's attempt in Paragraph B and E of the Act to regulate voluntary allowances and equipment rentals.

22. The requirement of Paragraph D of the Act that all voluntary allowances be extended uniformly to all retail service station dealers supplied would require statewide uniformity without regard to any need or justification for allowances on a more limited basis. The result would be to preclude all allowances, depriving companies subject to the Act of an opportunity to meet competition. This provision conflicts with the Robinson-Patman Act, 15 U.S. Code, Section 13, and is therefore pre-empted.

WHEREFORE, Plaintiff respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award Plaintiff declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the Plaintiff the provisions of the Act.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against the Plaintiff the provisions of the Act.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

Jerry J. Miller, Esq.
P.O. Box 1751
Amarillo, Texas 79105
806-374-0972
Of Counsel

/s/J. Edward Davis

/s/ Edward J. Smith, Jr.

Weinberg and Green
401 Washington Avenue
Suite 601
Towson, Maryland 21204
539-2125
Attorneys for Plaintiff

[Plaintiffs' Exhibit No. 1, Chapter 854 of the Laws of Maryland of 1974, Omitted in Printing]

ANSWER

(To Phillips Bill of Complaint)

Filed March 5, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock, Assistant Attorney General, in answer to the Bill for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That they admit that Phillips is a Delaware corporation, that is a producer and refiner of petroleum products, and that it is duly authorized to do business in the State of Maryland. Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1.

2. That they are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. That they are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.

4. That they admit the allegations contained in paragraphs 4 through 6, inclusive.

5. That they admit the allegations contained in paragraphs 7 through 9, inclusive.

6. That they deny the allegations contained in paragraph 10, specifically answering:

That the Act bears a real and substantial relation to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a real and substantial relation to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a real and substantial relation to providing a market place where retail dealers can compete with each other as independent businessmen, and reduces the dominance, direction and influence of the petroleum producers and refiners in the retail market. The Act as such is a legitimate objective of the Legislature and a valid exercise of the police power of the State and does not deny to Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The Act does not deny Phillips and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate state purpose in preserving the retail service station dealer as an independent businessman. The classification of producers, refiners, and wholesalers of petroleum products is a reasonable classification and bears a rational relationship to a legitimate state purpose in regulating gasoline pricing and distribution practices in Maryland.

The Act does not constitute a taking of part or all of Phillips' substantial investment in retail service stations and a taking of its property without just compensation

in violation of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The Act does not constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act is not so vague and ambiguous as to deny Phillips due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

Defendants admit that paragraph F of the Act may conflict with the Federal Emergency Petroleum Act of 1973 and that it may be invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraph D of the Act does not conflict with the Robinson-Patman Act, 15 U.S.C. §13, and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

7. That they deny the allegation contained in paragraph 11 that Phillips has an actual and present need for injunctive relief, but admit that Phillips has no adequate remedy at law and that it has an actual and present need for the declaratory relief which it seeks.

8. That they admit the allegation contained in the first sentence of paragraph 12 but deny the allegation contained in the second sentence of said paragraph 12 that the Act deprives Phillips of its property without due process of law and that it denies to Phillips its

rights to do business without undue and unreasonable restrictions and regulation. That they are without sufficient information and knowledge to form a belief as to the truth of the allegations contained in the third sentence of paragraph 12. They they deny the allegations contained in the fourth and fifth sentences of said paragraph 12 and further state that even though the Act does not contain any specific Legislative findings, the Legislature, after hearing testimony of the tremendous financial influence and control exercised by producers and refiners over the operation of retail service stations, did find and determine that it was in the public interest to preserve the retail dealer and to prohibit retail operation by vertically integrated producers and refiners.

9. That they admit that the Act prohibits producers and refiners from operating retail service stations and from selling their refined petroleum products through their stations operated with their salaried employees, but deny the remaining allegations contained in the first sentence of paragraph 13. They admit the allegation contained in the second sentence of said paragraph 13.

10. That they deny the allegations contained in paragraph 14.

11. That they deny the allegations contained in paragraph 15.

12. That they admit the allegations contained in paragraph 16 as to the extent that provisions of the Act are noted but deny that the Act is discriminatory. They further deny the allegation contained in paragraph 16 that the Act denies Phillips, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

13. That they admit the allegation contained in paragraph 17 that the Act establishes July 1, 1975 as the "divestiture date", but are without sufficient information and belief as to the truth of the remaining allegations contained in said paragraph 17.

14. That they admit the allegation contained in paragraph 18 that the Act will require either the closing of the company operated stations or their lease or rental to other parties for operation, but deny that this constitutes a taking of Phillips' property without compensation.

15. That they admit the allegations contained in the first two sentences of paragraph 19, but deny that the discretion granted to the Comptroller is unlimited and further deny that it constitutes an unlawful delegation of legislative authority and a denial of due process of law. They deny that paragraphs G and H of the Act are void.

16. That they admit the allegations contained in the first sentence of paragraph 20 as to the provisions of the Act. That they admit the allegations of the second sentence of said paragraph 20 in that the terms "voluntary allowances", "uniformly", and "all retail service station dealers" are undefined by the Act, but deny that such terms are unclear as alleged. They admit the allegations contained in the third and fourth sentences of said paragraph 20 as to the provisions of the Act, but deny that the term "apportion uniformly" is unclear as alleged. They deny the allegations contained in the remaining sentences of said paragraph 20.

17. That they admit the allegations contained in subpart (a) of paragraph 21. That they admit the

allegations contained in subpart (b) of said paragraph 21 as to the provisions of Section 4(b) of the Emergency Petroleum Allocation Act, but deny all allocation and allocation adjustment determinations are governed exclusively by the Regulations and the federal agency. That they admit the allegations in subpart (c) of said paragraph 21 to the extent that paragraph F of the Act may be preempted by the Federal Emergency Petroleum Allocation Act of 1973. They deny the remaining allegations of said subpart (c) of said paragraph (21).

18. That they deny the allegations in paragraph 22 and say that the precise terms of paragraph D of the Act do not conflict with and are not preempted by 15 U.S.C. §13 (the Robinson-Patman Act). The Robinson-Patman Act is designed to prevent anti-competitive price discriminations and paragraph D is not in conflict with that objective.

Further answering:

19. That they state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market, and thus seeks to improve the marketplace for the retail distribution of gasoline by making it responsive to normal economic forces.

20. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a

"take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner such as Phillips can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

21. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Phillips can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

22. That they state that price wars and the tremendous financial power of the petroleum producers and refiners such as Phillips have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

23. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner such as Phillips can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of

price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

24. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

25. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands. The Gasoline Tax Division also found that certain producers and refiners other than Phillips had terminated leases of retail dealers and had converted the outlets to company operated "Gas and Go" stations which provided no lubrication or repair services for the public.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunction, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of Maryland of

1974 should be issued, the Defendants respectfully pray that the Petition for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch
Attorney General of Maryland

/s/ Jon F. Oster
Deputy Attorney General

/s/ John A. Woodstock
Assistant Attorney General
One South Calvert Street
14th Floor
Baltimore, Maryland 21202
383-3737

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

In The Circuit Court For Anne Arundel County

Equity No. 22,562

Ashland Oil, Inc.,
Plaintiff,

v.

Marvin Mandel, Governor of the State of Maryland, et al.,
Defendants.

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Filed March 26, 1975

Ashland Oil, Inc. ("Ashland"), plaintiff herein, by its attorneys, institutes this action pursuant to the Uniform Declaratory Judgments Act, Section 3-403 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974 Edition), to obtain a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (1957 Edition, as amended), is unconstitutional. Ashland further seeks to obtain injunctive relief against the defendants, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, prohibiting each of them from enforcing the provisions of the Act. Ashland declares and alleges as follows:

The Parties

1. Ashland, incorporated under the laws of the State of Kentucky, is a refiner and marketer of petroleum products which owns and operates seventeen service stations in the State of Maryland; Ashland is an independent refiner in that it purchases approximately 85 percent of the crude oil which it refines. These stations employ approximately 140 people all of whom are employees of Ashland and are not lessees of Ashland owned stations. In addition, Ashland sells gasoline to others including wholesalers, who in turn sell gasoline to company-owned stations or independent dealers in Maryland. Ashland, or its subsidiaries, have owned and operated service stations in the State of Maryland since 1961. Ashland has never operated other than company-owned service stations in Maryland.

2. During the twelve months ended September 30, 1974, Ashland's seventeen Maryland service stations had total sales in excess of $12 million consisting almost entirely of gasoline. Ashland service stations do not perform service work or sell tires, batteries or accessories. In total, Ashland believes that it supplies 3 percent of the gasoline sold in Maryland. All of the gasoline sold by Ashland in Maryland is refined beyond the boundaries of that State and transported in interstate commerce to Maryland.

3. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland. He is sued herein in his official capacity.

4. The defendant, Francis B. Burch, Attorney General of the State of Maryland, is authorized to seek

injunctions against persons who violate Article 56 of the Annotated Code of Maryland (1957 Edition, as amended). He is sued herein in his official capacity.

5. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations. He is sued herein in his official capacity.

Motor Fuel Inspection Law

6. Article 56, Subtitle: Motor Fuel Inspection Law, Annotated Code of Maryland, §157A to §157U (1957 Edition, as amended) provides for the regulation of the sale of petroleum products in the State of Maryland. Pursuant to Article 56, §157F(g), criminal penalties may be imposed for violation of the Subtitle. One who violates any provision of the subtitle is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $5,000 or by imprisonment of not more than six months, or by both fine and imprisonment.

7. Senate Bill 465, enacted by the General Assembly at its 1974 session, was signed into law by Governor Mandel on May 31, 1974, and has become Chapter 854 of the Laws of Maryland of 1974 (the "Act"), effective July 1, 1974. Senate Bill 465 as signed into law amended Article 56, §157E by adding to §157E the following provisions:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, or a commissioned agent.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, or a commissioned agent.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

Pursuant to this Act, Ashland has been prohibited from opening new retail service stations in the State of Maryland since July 1, 1974. The Act further will require that Ashland divest its seventeen company owned service stations on or about July 1, 1975.

Constitutional Defects in the Act

8. Chapter 854 of the Laws of Maryland of 1974 is unconstitutional and, therefore, null and void for the following reasons:

a. Inasmuch as paragraphs B and C of the Act prohibit Ashland from engaging in the retail sale of gasoline in the State of Maryland, a lawful and legitimate business enterprise, the Act has no reasonable and substantial relation to the health, safety, morals, or welfare of the people of Maryland. The Act, therefore, exceeds the legitimate exercise of Maryland's police power and denies to Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

b. Under the provisions of paragraphs B and C of the Act, only refiners and producers of petroleum products are prohibited from engaging in the lawful business activity of the retail sale of gasoline while other significant components of the oil industry, and all other business entities, are not prohibited from retailing

gasoline in Maryland. The Act thus denies Ashland, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Right and the Fourteenth Amendment to the United States Constitution.

c. By prohibiting Ashland from owning and operating retail service stations in Maryland after July 1, 1975, paragraph C of the Act constitutes a taking of part or all of Ashland's investment in retail service stations as well as a part or all of Ashland's return on investment without just compensation and for private use in controvention of Article III §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment of the United States Constitution.

d. By regulating certain pricing and distribution practices of producers, refiners and wholesalers, without regulating the same practices by other persons or business entities, paragraphs D, E, and F of the Act deny Ashland, and others similarly situated, equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

e. The use of the terms "voluntary allowances" and "dealers supplied" in paragraph D of the Act is so vague that there is no rational means for Ashland to ascertain whether or not it is subject to the criminal sanctions imposed by Article 56, §157F, Annotated Code of Maryland (1974 Cumulative Supplement), which are applicable to the Act. Therefore, the Act denies Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

f. Paragraphs D, E, and F of the Act employ the term "uniformly" throughout. Within the context of the Act, these terms are so vague that there is no rational means for Ashland to ascertain whether or not it is subject to the criminal sanctions imposed by Article 56, §157F, Annotated Code of Maryland (1974 Cumulative Supplement), which are applicable to the Act. Therefore, the Act denied Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

g. Paragraph D of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution.

h. The Act is devoid of standards for use by the Comptroller of the Treasury in performing his duties thereunder. Accordingly, the Act provides no protection to Ashland against arbitrary, discriminatory or unreasonable exercise of the Comptroller's authority. Paragraphs G and H of the Act therefore constitute an unlawful delegation of authority in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

i. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

9. Unless enjoined by this Court, defendants will seek to enforce the provisions of the Act against Ashland thereby causing Ashland to suffer immediate and irreparable injury for which Ashland has no adequate remedy at law.

10. In view of the aforementioned allegations, an actual controversy exists between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and by the grant of injunctive relief, all as hereinafter requested.

WHEREFORE, Ashland respectfully prays that this Court:

1. Assume jurisdiction over the parties hereto pursuant to the Uniform Declaratory Judgments Act, and set this case down from prompt hearing for the purpose of determining the validity and rights of the parties under Chapter 854 of the Laws of Maryland of 1974.

2. Award Ashland declaratory relief pursuant to the Uniform Declaratory Judgments Act by declaring that Chapter 854 of the Laws of Maryland of 1974 is unconstitutional, illegal, invalid, and of no force and effect.

3. Issue a temporary injunction *pendente lite* prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland or their successors from enforcing in any way against Ashland, the provisions of Chapter 854 of the Laws of Maryland of 1974.

4. Issue a permanent injunction prohibiting Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of the State of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, or their successors from enforcing in any way against Ashland, the provisions of Chapter 854 of the Laws of Maryland of 1974.

5. Grant such other and further relief as shall be deemed necessary and appropriate.

Semmes, Bowen & Semmes,
/s/ David F. Albright,
and
Ginsburg, Feldman and Bress,
/s/ David Ginsburg,
/s/ Fred W. Drogula,.
/s/ Clark H. Onstad,
Attorneys for Ashland Oil, Inc.

Of Counsel:
Arloe W. Mayne
General Counsel
Ashland Oil, Inc.

ANSWER

(To Ashland Bill of Complaint)

Filed April 8, 1975

[Caption Omitted in Printing]

The Defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, John A. Woodstock and Stephen Cordi, Assistant Attorneys General, in answer to the Bill of Complaint for Declaratory Judgment and Injunctive Relief, and each and every paragraph thereof say:

1. That Defendants admit that Ashland is incorporated under the laws of the State of Kentucky and that

it is a refiner and marketer of petroleum products. Defendants are without knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1.

2. That Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. That Defendants admit the allegations contained in paragraphs 3, 4 and 5.

4. That Defendants admit the allegations contained in paragraphs 6 and 7.

5. That Defendants deny the allegations contained in paragraph 8 and in each and every subparagraph thereof, specifically answering:

The Act bears a reasonable and substantial relationship to the health, safety, morals, and welfare of the people of the State of Maryland. Furthermore, the Act bears a reasonable and substantial relationship to the economic welfare and continuing existence of retail service station dealers in the State of Maryland and bears a reasonable and substantial relationship to providing a marketplace where retail dealers can compete as independent businessmen in free and open competition with each other. The Act reduces the dominance, direction, and influence of the petroleum producers and refiners in the retail market and thereby restores freedom to the marketplace so that natural market forces can operate in place of the artificial forces which now exist. The Act does not exceed the legitimate exercise of Maryland's police power and does not deny to Ashland due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The Act does not deny Ashland and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. The classification of producers and refiners of petroleum products is an existing and recognized classification in the law and bears a rational relationship to a legitimate State purpose in preserving the retail service station dealer as an independent businessman and in promoting a marketplace for the retail sale of gasoline where natural market forces can freely operate.

The Act does not constitute a taking of part or all of Ashland's investment in retail service stations as well as a taking of part or all of Ashland's return on investment without just compensation and for private use in contravention of Article III, §40 of the Maryland Constitution, Article 23 of the Maryland Declaration of Rights, and the Fourteenth Amendment to the United States Constitution.

The classification of producers, refiners, and wholesalers of petroleum products is a reasonable classification in the law and bears a rational relationship to a legitimate State purpose in regulating gasoline pricing and distribution practices in Maryland. Paragraphs D, E, and F of the Act do not deny Ashland and others similarly situated equal protection of the laws in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The terms "voluntary allowances", "dealers supplied", and "uniformly" as used in the Act are not so vague as to deny Ashland due process of law in violation of Article 23 of the Maryland Declaration of

Rights and the Fourteenth Amendment to the United States Constitution.

Paragraph D of the Act does not conflict with 15 U.S.C. §13 (the Robinson-Patman Act), and, accordingly, is not invalid under the Supremacy Clause of Article VI of the United States Constitution.

Paragraphs G and H of the Act do not constitute an unlawful delegation of authority to the Comptroller of the Treasury in violation of Article 23 of the Maryland Declaration of Rights and Article III of the Maryland Constitution.

The Act does not discriminate against and does not unduly burden interstate commerce and is not invalid under the Commerce Clause of Article I, §8 of the United States Constitution.

6. That Defendants admit the allegation contained in paragraph 9 that Ashland has no adequate remedy at law but deny that Ashland will suffer immediate and irreparable harm unless Defendants are enjoined by this Court from enforcing the provisions of the Act.

7. That Defendants admit the allegations contained in the first sentence of paragraph 10. They further admit that the controversy can be determined by a declaratory decree setting forth the rights of the parties.

Further answering:

8. That Defendants state that the statute in question is a legitimate exercise of the police power of the State in preserving the existence of the retail dealer as an independent businessman and in reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market, and thus seeks to improve the market place for the retail distribution of gasoline by making it responsive to normal economic forces.

9. That they state that the tremendous financial power of the vertically integrated producers and refiners and the fact that they can operate retail stations permit them to offer retail dealers short term company-drafted leases with cancellation clauses without cause on a "take it or leave it" basis. The short term lease is the vehicle by which the vertically integrated petroleum producer and refiner can exercise control over the retail market and discipline price conscious and competitively oriented retail dealers.

10. That they state that the vertically integrated petroleum producer and refiner does not have to make its profit through retail sales but can make its profit through producing, refining, wholesaling and transportation. Consequently, companies such as Ashland can afford to conduct their retail operations at a loss and to engage in price wars that are ruinous to many retail dealers and costly to the consuming public in areas without price wars who may pay an inflated price to finance such wars.

11. That they state that price wars and the tremendous financial power of the petroleum producers and refiners have led to economic chaos in the retail service station business and have impaired the capacity and capability of many retail dealers to render the complex range of services which modern motoring conditions require.

12. That they state that the price wars have financially ruined many retail dealers who have only one location in which to compete whereas the petroleum producer and refiner can compete over a wide range of territory and thus compensate for losses in a particular area. As a result of the economic hardship from price wars, the turnover ratio and failure

ratio of retail service station dealers is higher than in any other principal business classification. Furthermore, while the total number of active service stations has been decreasing, certain areas are saturated and overbuilt with service stations. A final result of price wars can be a reduction in meaningful competition and a general increase in prices to a higher level than would otherwise have existed.

13. That they state that in this State the Gasoline Tax Division of the Office of the Comptroller of the Treasury found that the turnover ratio for dealerships in retail service stations was 39.1 percent for the two year period from January 1, 1972, through December 31, 1973, and that there were 303 fewer service stations to serve the public at the end of the same period.

14. That they state that as a result of the gasoline shortage in 1973 when retail dealers were suffering supply problems and lease cancellations and were altering their hours of operation, the Governor of Maryland directed the Gasoline Tax Division of the Office of the Comptroller of the Treasury to undertake a study of the retail gasoline situation during June, July, and August, 1973. The Gasoline Tax Division found that retail service stations which were company owned and operated had no difficulty in securing gasoline to sell, whereas non-company retail dealers were not supplied with all of the gasoline which they needed to stay open and meet demands.

WHEREFORE, having fully answered the Bill of Complaint for Declaratory Judgment and Injunctive Relief, and having shown cause why neither a temporary nor a permanent injunction prohibiting the Defendants from enforcing Chapter 854 of the Laws of

Maryland of 1974 should be issued, the Defendants respectfully pray that the Bill of Complaint for Declaratory Judgment and Injunctive Relief be dismissed without leave to amend, with costs to be paid by Plaintiff.

/s/ Francis B. Burch,
Attorney General of Maryland
/s/ Jon F. Oster,
Deputy Attorney General,
/s/ John A. Woodstock,
Assistant Attorney General,
/s/ Stephen Cordi,
Assistant Attorney General,
Attorneys for Defendants.

[Certificate of Service Omitted in Printing]

In The Circuit Court For Anne Arundel County

Equity Nos. 22,069, 22,091, 22,216, 22,461, 22,502, 22,551, and 22,562

Exxon Corporation, et al.,
Plaintiffs,

v.

Marvin Mandel, Governor, et al.,
Defendants.

ORDER ENTERED AT PRE-TRIAL CONFERENCE

Filed May 5, 1975

Pursuant to the direction of the Court a pre-trial conference was held on May 5, 1975 attended by counsel for the parties and the Court. Pursuant thereto and for good cause appearing it is

ORDERED:

1. Defendants shall not enforce the provisions of Chapter 854 of the Laws of Maryland, 1974, against plaintiffs while the instant case is pending.

2. Plaintiffs shall not, while the instant case is pending open a major brand, secondary brand or unbranded retail service station and operate it with company personnel, personnel of a subsidiary company or a commissioned agent, or convert an existing retail service station in the State of Maryland which is on this date being operated by an independent dealer to

company operation, without, in either event, first notifying the defendants of their intention to do so and the reasons therefor.

3. This Order shall not be deemed to prejudice either plaintiffs' or defendants' right to seek other temporary relief pending a final decision in this case by the Circuit Court for Anne Arundel County.

Entered this 5th day of May, 1975.

E. Mackall Childs,
Judge.

Signatures of Counsel

s/ John A. Woodstock, Esquire,
Assistant Attorney General
Attorney for Defendants.

s/ Lewis A. Noonberg, Esquire,
Piper and Marbury,
Attorneys for Plaintiff
Exxon Corporation,

s/ William Simon, Esquire,
Howrey, Simon, Baker & Murchison,
Attorneys for Plaintiff
Shell Oil Company,

s/ Wilbur D. Preston, Esquire,
Whitford, Taylor, Preston,
Trimble & Johnson,
Attorneys for Plaintiffs
Continental Oil Company, et al.,

s/ Lawrence S. Greenwald, Esquire,
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander,
Attorneys for Plaintiff
Gulf Oil Corporation,

s/ J. Edward Davis, Esquire,
Weinberg and Green,
Attorneys for Plaintiff
Phillips Petroleum Company.

EXXON CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Filed May 29, 1975

[Caption Omitted in Printing]

Plaintiff, Exxon Corporation, ("Exxon") moves pursuant to Maryland Rule 610 for partial summary judgment declaring paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974 ("the Act") invalid. There is no genuine dispute as to any material fact and Exxon is entitled to judgment as a matter of law. In support thereof Exxon respectfully represents:

1. Exxon and the defendants have stipulated to the following facts:

a. "Exxon, incorporated under the laws of the State of New Jersey, is a producer and refiner of petroleum products and owns and operates retail service stations in the State of Maryland. Exxon believes it is the leading supplier of gasoline in Maryland selling to dealers, wholesalers, the public and others approximately 19 percent of all the gasoline sold in Maryland. All of the gasoline sold by Exxon in Maryland is transported into the state from refineries located

beyond the boundaries of the state." (Complaint ¶1, Answer ¶1.)

b. As of July 1, 1974 there were 532 service stations in Maryland receiving their petroleum products directly from Exxon. 36 of these service stations were company operated. The remainder were operated by independent dealers. (Proffer of Evidence ¶16 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

c. "Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its dealers or resellers without making a general price reduction or allowance throughout the State." (Proffer of Evidence ¶26 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

d. "The sale of gasoline in Maryland and in the United States is currently being regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 [and the Federal Energy Administration Act of 1974] and the regulations issued thereunder. Exxon has been and continues to operate in full compliance with said Act and regulations." (Proffer of Evidence ¶29 and see letter of Assistant Attorney General to Judge Evans September 11, 1974).

2. Paragraph D of the Act provides:

"Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

3. Paragraph D of the Act is in conflict with Section 2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b) and is, therefore, invalid under Article VI of the United States Constitution (the Supremacy Clause).

4. Paragraph F of the Act provides:

"Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

5. Paragraph F of the Act is in conflict with and is preempted by the Federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.* and the Federal Energy Administration Act of 1974, 15 U.S.C. §761 *et seq.* and is, therefore, invalid under Article VI of the United States Constitution (the Supremacy Clause).

/s/ William L. Marbury,
/s/ Lewis A. Noonberg,
/s/ David F. Tufaro,

Piper & Marbury,
Attorneys for Plaintiff,
Exxon Corporation.

Of Counsel:
Richard P. Delaney,
May 29, 1975

[Notice to Defendants and
Certificate of Service Omitted in Printing]

SHELL OIL COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Filed May 29, 1975

[Caption Omitted in Printing]

Plaintiff Shell Oil Company ("Shell") moves for partial summary judgment declaring that Paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 ("Maryland Act") are invalid. Although a favorable ruling with respect to the issues presented in this motion may not dispose of the entire litigation, such a ruling would limit the many issues presently before the Court. More importantly, it would properly direct the focus of the trial to the heart of this litigation, namely the divorcement provisions of Paragraph C of the Maryland Act. In this light and on the basis that (1) there is no genuine dispute as to any material fact relating to the issues raised by Shell's motion and (2) the record establishes, as to the legal question presented, that Paragraphs D and F unconstitutionally conflict with federal law, Shell is entitled to partial summary judgment as a matter of law declaring that

Paragraphs D and F of the Maryland Act are unconstitutional, illegal, invalid and of no force and effect.

This motion is based on the facts, law and reasons stated herein, and in the attached memorandum of points and authorities which is incorporated herein by reference.

/s/ William Simon,
/s/ Robert G. Abrams,
/s/ Michael E. Campbell,
Howrey, Simon, Baker & Murchison,
/s/ George W. Shadoan,
Shadoan & Mack.

Dated: May 29, 1975

AFFIDAVIT OF WALTER D. NAUGHTON
Filed May 29, 1975

[Caption Omitted in Printing]

County of Harris, State of Texas, ss:

WALTER D. NAUGHTON, being duly sworn upon oath, deposes and says:

1. I am the Marketing Manager for the Southeast Area of Shell Oil Company, and, in this position, I am responsible for Shell's retail marketing operations in the State of Maryland. Though approximately 26 years of experience with Shell, largely in marketing, I have developed an extensive background in service station retailing and other aspects of petroleum marketing.

2. Under specified market conditions, Shell grants temporary price reductions, or "competitive allowances", to its branded retail dealers. Shell's purpose in granting competitive allowances is to provide competitive and equitable assistance in gasoline prices to Shell dealers who are injured by local competitive gasoline price reductions of competing retailers which are subsidized by their suppliers.

3. A competitive allowance is intended for use when Shell's branded dealers suffer financial injury, in terms of loss of customers, reduced unit profit, or both, because a supplier in competition with Shell lowers its price to its retail dealers. By meeting its competition through reduced product cost to its dealers, Shell enables those dealers to remain competitive and thus retain the business of their customers.

4. The "trade area" is the basic geographic area for the authorization of competitive allowances.

5. A trade area is a specific geographic area in which an assessment by Shell field personnel and staff analysts indicates that competitive marketing conditions are substantially the same. All service stations within a trade area have exposure to substantially the same customers and therefore the ability to compete with one another on a relatively equal basis. There are one or more, usually several, Shell service stations in each trade area. The areas may be of various sizes with the smaller ones generally in the more densely populated metropolitan districts where the customer potential is concentrated; larger ones are more characteristic of less populous areas or corridors along heavily traveled arterials where commuter or transient travel is heavy over considerable distances.

6. An example of a Shell designated trade area is one located in the northeastern section of Baltimore County. It is a long narrow corridor beginning at the Baltimore Beltway (I-695) and Belair Road (U.S. 1), running in a northerly direction along Belair Road to the Gunpowder Falls. It is bounded on the east and the west by the property adjacent to Belair Road. It contains three Shell branded service stations and sixteen competitive stations. All of the service stations as well as churches, a few small stores and a shopping center are located on Belair Road. To the many residents of this area the service stations in this corridor provide the most convenient location to purchase gasoline. These people commute to their places of employment in downtown Baltimore, the county seat in Towson and the factories of eastern Baltimore County via the Baltimore Beltway and, therefore, do not have convenient access to other service stations.

7. Shell's policy is to grant competitive allowances only when certain marketing conditions exist. First, Shell grants a competitive allowance only if a Shell dealer requests it; Shell never initiates price assistance. Second, the Shell dealer requesting the allowance must be able to demonstrate real business losses from competitors selling at lower prices. *Third, Shell must determine whether it, and not simply its dealers, is meeting competition; it is not sufficient that a Shell dealer is competing with a lower retail price, but that lower price must be supported by that competing dealer's wholesale supplier.*

8. If Shell grants a competitive allowance to a dealer, it is Shell's policy to offer an equal allowance to all Shell dealers in the same trade area. To the extent necessary to avoid competitive injury, allowances in

appropriate competitive amounts are also given to Shell dealers in adjoining trade areas. The amount of such allowances decreases as the distance from the trade area increases.

9. When Shell grants a dealer an allowance it does not, directly or indirectly, secure the dealer's agreement that the allowance will be reflected in a lower retail price. Whether the dealer will account for his lower cost resulting from the allowance by reducing his retail price is a decision solely within the dealer's discretion.

10. In referring to Shell's then existing plan for granting competitive allowances, which was essentially the same as explained in paragraphs two (2) through eight (8) above, the Federal Trade Commission stated:

> That the Commission's statement of Policy [regarding competitive allowances] can be realistically applied to area price differentials in the petroleum industry was impressively demonstrated in recent hearings before a subcommittee of the House Select Committee on Small Business. There, representatives of Shell Oil Company . . . testified that, in view of the Robinson-Patman Act, such "price assistance" as they give dealers is now offered to all their dealers in a competitive retail marketing area. Their testimony as to this practice emphasize essentially the same elements as the Commission's Statement of Policy.

11. As Marketing Manager for Shell's Southeast Area, I have been advised that Sections 2(a) and 2(b) of the Robinson-Patman Act require a limitation of competitive allowances to specifically delineated trading areas which are substantially smaller in geographic scope than the entire State of Maryland.

12. On the average, Shell supplies 411,000 gallons of automotive gasoline per day within the State of Maryland. If Shell were to grant a price allowance of 3¢ for every such gallon, the cost to Shell would be approximately $12,000 per day.

13. Granting the same price allowance to all Shell dealers throughout the State of Maryland rather than confining the grant of allowances to those Shell dealers located in trade areas experiencing competitive conditions which justify such grants would be a deviation from Shell's normal business practices.

/s/ Walter D. Naughton.

(Notarized)

[Certificate of Service Omitted in Printing]

GULF OIL CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Filed June 19, 1975

[Caption Omitted in Printing]

Gulf Oil Corporation ("Gulf"), plaintiff, by its attorneys, moves pursuant to Maryland Rule 610 for partial summary judgment declaring invalid Paragraphs D and F of Chapter 854 of the Laws of Maryland, 1974, codified as Maryland Annotated Code, Article 56, §157E, hereinafter called "the Act", and enjoining the enforcement thereof. The grounds underlying this motion are as follows:

1. Paragraph D of the Act conflicts with Section 2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b).

Therefore, Paragraph D violates the Supremacy Clause (Article VI) of the United States Constitution.

2. Paragraph F of the Act conflicts with the federal Emergency Petroleum Allocation Act, 15 U.S.C. §751, *et seq.*, and regulations promulgated thereunder. Therefore, Paragraph F violates the Supremacy Clause of the United States Constitution and the preemption clause of the Emergency Petroleum Allocation Act, 15 U.S.C. §755(b).

There is no genuine dispute as to any fact material to this motion, and Gulf Oil Corporation is entitled to partial summary judgment as a matter of law. A supporting memorandum and affidavit are attached hereto. Gulf respectfully joins in the motions for partial summary judgment heretofore filed by Shell Oil Corporation and Exxon Corporation, and adopts the reasoning set forth in their supporting memoranda.

/s/ Lawrence S. Greenwald,
/s/ Nancy E. Paige,
Gordon Feinblatt, Rothman,
Hoffberger & Hollander,
Attorneys for Gulf Oil
Corporation, Plaintiff.

[Notice to Defendants Omitted in Printing]

AFFIDAVIT IN SUPPORT OF GULF OIL CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Filed June 19, 1975

[Caption Omitted in Printing]

I, George W. Ruppersberger, am the director of retail marketing of Gulf Oil Company – U.S., a division of Gulf Oil Corporation. I am competent to be a witness, and have personal knowledge of the facts herein stated.

From time to time, Gulf Oil Corporation grants allowances in various forms to retail service station dealers to meet competition from other suppliers of gasoline and other petroleum products, without extending such allowances on a state-wide basis.

/s/ George W. Ruppersberger.

(Notarized)

ANSWER TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFFS EXXON CORPORATION, SHELL OIL COMPANY AND GULF OIL CORPORATION

Filed July 7, 1975

[Caption Omitted in Printing]

The defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General, and John A. Woodstock and Stephen M. Cordi, Assistant Attorneys General, in answer to the Motions

For Partial Summary Judgment filed by Exxon Corporation, Shell Oil Company, and Gulf Oil Corporation, say:

1. There is a genuine dispute between the parties as to facts which are material to plaintiffs' claim that they are entitled to a partial summary judgment declaring that Paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 are unconstitutional, illegal, invalid, and of no force and effect, as is more fully explained by defendants in their Memorandum In Support Of Their Response And Opposition To Plaintiffs' Motions For Partial Summary Judgment and accompanying affidavit of James M. Patterson which are attached hereto and which are incorporated herein by reference.

2. Defendants deny that Exxon Corporation, Shell Oil Company, and Gulf Oil Corporation are entitled to a partial summary judgment as a matter of law, as is more fully explained in their aforesaid Memorandum and accompanying affidavit.

3. Defendants specifically deny that there is any unconstitutional conflict between paragraphs D and F of Chapter 854 of the Laws of Maryland of 1974 and Section 2(b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(b). Defendants further deny that there is any unconstitutional conflict between said paragraphs D and F and the federal regulation of the allocation and pricing of petroleum products, conducted pursuant to the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. §751, *et seq.*, and the Federal Energy Administration Act of 1974, 88 Stat. 96, 15 U.S.C. §761, *et seq.*

/s/ Francis B. Burch,
Attorney General of Maryland,

/s/ Jon F. Oster,
Deputy Attorney General,

/s/ John A. Woodstock,
Assistant Attorney General,

/s/ Stephen M. Cordi,
Assistant Attorney General,
Attorneys for Defendants.

AFFIDAVIT OF JAMES M. PATTERSON, Ph.D.
Filed July 7, 1975
[Caption Omitted in Printing]

County of Monroe, State of Indiana, ss.

JAMES M. PATTERSON, being duly sworn upon oath, deposes and says:

My name is James M. Patterson. I live at 2431 North Dunn Street in Bloomington, Indiana. I am Professor and Chairman of Marketing in the Graduate School of Business at Indiana University. Since 1969, I have been engaged in research on the marketing of gasoline. In collaboration with Professor Fred Allvine of Georgia Institute of Technology, I have written two books on gasoline marketing: *Competition Ltd.: The Marketing of Gasoline* (Bloomington: Indiana University Press, 1972) and *Highway Robbery: An Analysis of the Gasoline Crisis* (Bloomington: Indiana University Press, 1974). I have a Ph.D. in Managerial Economics and Politics from Cornell University. I have been in the Marketing

Department at Indiana University since 1960. Prior to that I was an Instructor in the School of Management at Northwestern University. I have been a frequent witness before the Congress on gasoline marketing policy and have testified in numerous antitrust cases as an expert witness regarding marketing arrangements and practices. My publications related to competition in the petroleum industry include:

With Fred C. Allvine, *Competition Ltd.: The Marketing of Gasoline*, Indiana University Press: Bloomington, Indiana, 1972.

"Vertical Integration, Product Shortages and the Marketing of Gasoline," in John Wilson (ed.), *Proceedings of the British Columbia Energy Conference*, University of Victoria, Institute for Policy Analysis, 1974.

"Competitive Market Conditions in the Petroleum Industry," U.S. Congress, Senate Committee on Interior and Insular Affairs, *Market Performance and Competition in the Petroleum Industry*, Part 2, 93rd Congress 1st Session, pp. 530-557. [1974].

With Fred C. Allvine, "Shortages and Gasoline Marketing," *Business Horizons*, April 1974, pp. 5-17.

"The Structure, Conduct and Performance of the Petroleum Industry." A statement before the U.S. Senate, Committee on the Judiciary, Sub-committee on Anti-Trust and Monopoly, August 7, 1974.

With Fred C. Allvine, *Highway Robbery: An Analysis of the Gasoline Crisis*, Bloomington, Ind.: Indiana University Press, 1974, 261 pp.

I wish to speak to the reasonableness of section 157 E(c) and section 157 E(d) of Art. 56, Section E of the Annotated Code of Maryland relating to the operation of retail gasoline service stations by producers or refiners and providing for the uniform treatment of retail dealers.

In my research, I have found that several of the marketing practices that have been developed by the vertically integrated major oil companies appear to be designed to frustrate the effectiveness of competition as a regulator of market behavior in this industry.

My research also shows that there is reason to be concerned about the vitality of competition in the marketing of gasoline. Of particular concern is the need to maintain the vitality of intertype competition between the major integrated firms with their fundamentally non-price methods of marketing-gasoline and the cadre of independent private-brand marketers with their price-discount marketing approach. These discounters have traditionally served a competitive function in the gasoline business which is completely disproportionate to the share of market they command. By aggressively discounting gasoline several cents under the normal suggested retail price of the majors, they act as a check on the marketing margins the majors can enforce on the market. Evidence of this role is provided by the excessive margins charged during the 1973-75 shortage, when the independent marketers ceased to function as an effective margin regulator because they were being denied gasoline by their integrated suppliers. This dramatic rise in margins, mind you, was during a period of Federal price controls. Furthermore, once the mandatory allocation program began to redirect the flow of gasoline back to the independent outlets, major

brand margins automatically began to shrink because of revived intertype competition.

My research further shows that the major oil companies have used a variety of unfair techniques to thwart the functioning of intertype competition. During the early 1960's a principal response of the majors was to subsidize regionally focused price wars with profits from other geographic areas or from other functional levels, especially the tax sheltered, cartel-priced, crude oil level.

The mechanism for implementing this strategy of focused price warfare was price protection or price assistance. This technique for focusing the diversified financial power of the major vertically integrated firms in the industry was further refined by a technique called zone pricing. My research showed that the purpose and effect of price protection and zone pricing was to discipline and control selected independent marketers who were aggressively seeking a larger share of the market through price cuts.

In our book *Competition Ltd.:*, which was based on extensive primary and secondary research, Professor Allvine and I concluded that price protection and zone pricing techniques had been a very effective device for curbing intertype competition and thus for subverting the normal forces that regulate the gasoline market. As a consequence, we argued that price assistance and zone pricing and other forms of dealer subsidies should be forbidden as unfair trade practices which tend to lessen competiton.

Maryland's law which seeks to provide for the uniform treatment of retail service station dealers is perfectly consistent with the findings of my research;

namely, that price assistance programs coupled with zone pricing are techniques which are primarily used to discipline independent discount marketers and hence are destructive of intertype competition.

Paragraph (d) which requires the uniform extension of price support to all stations would limit the ability of the vertically integrated firm to focus its superior financial power on the aggressive independent by means of zone pricing techniques. Under this provision, price subsidies would have to be extended throughout the entire market area, not just within narrowly defined trade areas or zones. This would make it impossible to focus the subsidy by confining it to a relatively few stations around the offending independent. This law does not prevent price competition by either the supplier through general dealer tankwagon price reductions or by the dealer himself through margin reduction.

Paragraph (d) merely closes a loophole which would otherwise allow a supplier to offer indirect price subsidies to selected dealers in order to underwrite their price competition with selected aggressive independents.

Paragraph (c) of the Maryland statuate is also consistent with the findings of my most recent research.

In Chapter 4 of *Highway Robbery: An Analysis of the Gasoline Crisis*, Professor Allvine and I documented the factors which made old marketing strategies less suitable for the emerging marketing situation in the gasoline industry. Such factors as the end of the crude-oil tax shelter and profit cache, the end of oil colonialism, the deterioration of international crude profits, the regulation of domestic crude prices. These and many other factors which represent a "decline in

the old order" have resulted in a series of marketing moves by the majors to improve marketing profitability.

Among the documented moves are the following:

1. Direct entry into private-brand discount marketing through the use of "secondary brands."

2. Withdrawal from unprofitable market areas.

3. Accelerated closing of low volume stations.

4. Curbing of price assistance programs and the search for new ways of pricing gasoline to retailers and of influencing retail price competition without price subsidies based on tankwagon prices.

One of the ways that price assistance can be limited where traditional price assistance programs have proved excessively expensive is to move into direct operation through employee operated stations either as a "fighting brand" or with its primary brand. Direct operations gives the integrated supplier even more power to focus its superior diversified financial power than does the traditional price assistance-zone price technique. Consequently, on the basis of my recent research, I would conclude that the regulation of direct operations is also essential if crucial intertype competition is to be maintained as a vital regulator of marketing margins in the gasoline industry. Events since the passage of the Maryland statute bear out this contention.

In sum I find both provisions of the Maryland statute consistent with my understanding of the workings of this industry which has been developed through several years of intense research on the marketing of gasoline. I also find these provisions reasonably designed to preserve and promote intertype competition as the crucial

regulator of marketing margins in this important industry which is so crucial to our economic well being.

/s/ JAMES M. PATTERSON

(Notarized)

AFFIDAVIT OF HAROLD J. SCHULZ
Filed August 11, 1975
[Caption Omitted in Printing]

State of Virginia, County of Richmond, ss:

1. I am the Area Distribution Manager for the Mid-Atlantic Area of Shell Oil Company, and, in this position, I am responsible for the delivery of finished petroleum products in the States of Maryland, Virginia and parts of North Carolina, Pennsylvania and Delaware. I am the administrator of the delivery facilities through which the finished petroleum products are transported. I have been employed in this position since May 15, 1974.

2. Shell neither produces crude oil nor operates any refinery in the State of Maryland, and Shell is not engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Shell's operations in Maryland are limited to the distribution and marketing of petroleum products.

3. Gasoline and other refined motor vehicle fuels sold under the Shell brand in the State of Maryland primarily come from Shell's refineries at Deer Park, Texas and Norco, Louisiana. These products are transported by pipeline or tanker to two terminals

which supply customers in Maryland. The terminals are located in Springfield, Virginia and Wagner's Point, Maryland.

4. Prior to distribution from Shell's two terminals, additives are injected into the gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

/s/ HAROLD J. SCHULZ.

(Notarized)

MOTION FOR LEAVE TO APPEAR AND PRESENT MEMORANDA AND ARGUMENT AS AMICI CURIAE

Filed September 9, 1975

[Caption Omitted in Printing]

Day Enterprises, Inc. trading as Day's Crown, Booth's, Inc., Dolan Enterprises, Inc. and PLB Industries, Inc., move for leave to appear and present memoranda and argument as Amici Curiae in connection with the determination of these actions and for reasons state:

1. Day Enterprises, Inc. operates an independent gasoline service station under the name Day's Crown at Route 198 and Brockridge Road, Laurel, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

2. Booth's, Inc. operates an independent gasoline service station at 500 Frederick Road, Baltimore,

Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

3. Donlan Enterprises, Inc. operates an independent gasoline service station at 4305 Leeds Avenue, Baltimore, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

4. PLB Industries, Inc., operates an independent gasoline service station at 4501 Falls Road, Baltimore, Maryland. The service station is leased from its supplier, Crown Central Petroleum Corporation.

5. Crown Central Petroleum Corporation is the largest independent gasoline marketer in Maryland and enjoys approximately a 5% share of gallonage sales in that state. It possesses the fifth largest market share in Maryland of all gasoline marketers, including the major oil companies, being surpassed only by Exxon, American Oil, Shell and Gulf.

6. Prior to 1968 Crown Central Petroleum Corporation had itself owned and operated its own service stations in Maryland. Beginning in that year it began to sell its gasoline through independent dealers in multi-pump stations, selling gasoline and motor oil, unaccompanied by auxiliary services. However, Crown continued to attempt to exercise rigorous control over the prices charged by its dealers for gasoline. In consequence in 1973 it was sued in the United States District Court by four such dealers in cases consolidated as Phillips et al. v. Crown Central Petroleum Corporation, Civil No. 73-303, 304, 504, and 506H. On May 20, 1975 the United States District Court for the District of Maryland in a lengthy Opinion[1] found that Crown had violated Section 1 of the Sherman Antitrust

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[1] Attachment A hereto

Act by entering into illegal vertical agreements fixing the retail prices of gasoline in the Baltimore metropolitan area and by conspiring horizontally with competitors including Ashland Oil, Inc., Petroleum Marketing Corporation, Amerada Hess Corporation and Meadville Corporation in the fixing of retail prices of gasoline in the Baltimore metropolitan area.

7. Recently, Crown Central caused all its existing dealer contracts and leases in the State of Virginia to be cancelled and announced its intention to convert existing gasoline stations in the State of Virginia to company owned stations which will enable it to effectively control the retail pricing of Crown gasoline in that state.[2] Movants believe that in the event that the statute precluding company ownership of gasoline stations in Maryland is not upheld Crown will endeavor to restore its control over the pricing of Crown gasoline in Maryland by terminating movants leases and the leases of other Crown dealers in Maryland and converting their stations to company owned and operated stations.

8. Counsel for the movants were counsel for the Plaintiffs in the Phillips litigation in the United States District Court for the District of Maryland and have also been counsel in other anti-trust litigation involving the petroleum industry. Movants believe that they are in a position to usefully supplement the legal arguments to be presented by the Attorney General in support of the validity of the statute under attack by familiarizing the court with the pertinent legal authorities and literature relating to the commercial setting against which the Maryland statute was enacted.

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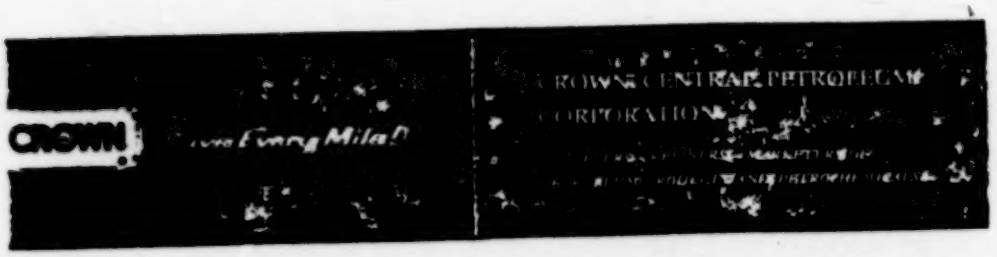
[2] Attachment B hereto

9. Because of the expressed desire of the Court and of all parties for an early determination of the issues in the present proceeding movants do not seek leave to intervene as parties to the action but seek leave only to present briefs and oral argument at any hearing on the constitutional issues involving sub-paragraphs B and C of the Act.

/s/ Robert G. Levy,
/s/ George W. Liebmann,
Frank, Bernstein, Conaway
& Goldman.



INTERIM REPORT

FOR THE SIX MONTHS ENDED JUNE 30, 1975

To the Stockholders:

There is submitted herewith an interim Statement of Consolidated Income of Crown Central Petroleum Corporation and its Subsidiaries for the six months ended June 30, 1975. The comparative figures for the prior year are also shown.

Net income for the first six months of 1975 was $2,057,605 amounting to $1.28 per share on gross revenues of $230,167,466 as compared with a net income of $2,940,765 or $1.83 per share on gross revenues of $188,340,992 for the same period in 1974 after adjusting the amounts originally reported for 1974 to give effect to the LIFO method of determining inventory value.

The increase in gross revenues of approximately 22% reflects primarily the combination of an approximate 35% increase in volume sold and an approximate 7.5% decrease in the average price per gallon received on all sales. The decrease in net income of approximately 30% reflects a combination of the adverse effects of the decrease in the average price per gallon received and the increase in income taxes payable caused by the elimination of the percentage depletion deduction and the favorable effect of several other factors, including a decrease of approximately 1% in the average cost per barrel for crude oil purchased and decreases in unit cost of operation in various areas. While total operating costs have continued to increase, in a number of instances these increases have been at a lesser rate than the increases in volumes over the severely curtailed levels in the first half of 1974. Another favorable factor was the decision to liquidate the Sunset Properties production payment effective May 1, 1975, which increased net profits for the months of May and June by approximately $500,000.

The decrease in the average price per gallon received reflects highly competitive conditions, which have prevailed during the first half of 1975, of an excess of available supplies for many products over effective demand. This competitive condition is continuing. In an effort to recover a part of the decrease which had occurred, the Company in early July increased prices for gasoline throughout its marketing territory. It shortly became apparent that there was insufficient demand at this higher price and the Company has already instituted price reductions in various areas. While there may be further increases in product prices resulting from further increases in costs caused by the imposition of supplemental fees on imported crude oil and from increases in ceiling prices for domestic crude oil, it is now unlikely that these cost increases can be fully reflected in price increases.

Although Crown has been a net seller of entitlements under the Oil Entitlements Program, which was intended to reduce the disparity between the average crude costs of independent refiners and such costs of major competitors, this program has not been effective in the case of Crown, and notwithstanding the above mentioned decrease of about 1%, its average crude cost has continued to be higher than in the case of the major integrated companies with which it competes.

As was reported in April, it was anticipated that the production payment loan on the Sunset Properties, which were acquired several years ago, would be fully liquidated by the end of the third quarter, approximately four years before the originally projected payout. Paying out at this accelerated rate would have required a cash expenditure in excess of $2,200,000 in about five months and after review of this and other cash requirements of the Company, it was decided to borrow $5,000,000 from a group of banks for a two-year period for the purposes of prepaying the remaining balance on the production loan and providing funds for other projects. Capital expenditures. The Company also financed an electrostatic precipitator pollution control for the F.C.C. Unit through tax exempt bonds in the amount

[illegible] ... [illegible] ... [illegible] ... [

PRE-TRIAL ORDER
Filed October 9, 10, 1975
[Caption Omitted in Printing]

Plaintiffs, Exxon Corporation, Continental Oil Company, Kayo Oil Company, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Corporation, Petroleum Marketing Corporation, Commonwealth Oil Refining Company, Inc., and Ashland Oil, Inc., by their attorneys, and defendants, Marvin Mandel, Governor of Maryland, Francis B. Burch, Attorney General of Maryland, and Louis L. Goldstein, Comptroller of the Treasury of Maryland, by their attorneys, respectfully submit the following Pre-Trial Order for court approval.

I. *History of the Litigation.*

1. This litigation was commenced when Exxon Corporation ("Exxon") filed suit against defendants on June 17, 1974 alleging the unconstitutionality of Chapter 854 of the Laws of Maryland of 1974. Plaintiffs Continental Oil Company and Kayo Oil Company ("Kayo") and Shell Oil Company ("Shell") subsequently filed similar suits on June 28th and September 3rd, 1974, respectively. Plaintiffs Gulf Oil Corporation ("Gulf"), Phillips Petroleum Company ("Phillips"), Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc. ("Petroleum Marketing") and Ashland Oil, Inc. ("Ashland") filed bills of complaint on January 23, 1975, February 14, 1975, March 19, 1975 and March 26, 1975,

respectively. All of these suits are consolidated for purposes of the trial of this case.

2. On May 5, 1975 (on July 24, 1975 for Petroleum Marketing), the Court entered an order prohibiting defendants from enforcing against plaintiffs the provisions of Chapter 854 while the instant case is pending and at the same time prohibiting plaintiffs, while the instant case is pending, from opening and operating service stations with company personnel, personnel of a subsidiary company or a commissioned agent without first notifying the defendants of their intention to do so.

3. Motions for partial summary judgment with respect to paragraphs D and F of Chapter 854 were filed by Shell and Exxon on May 29, 1975 and by Gulf on June 19, 1975. A hearing on these motions has been set for August 22, 1975. As a result of the deposition of John K. Coleman, Chief of the Gasoline Tax Division of the Comptroller's office, taken by plaintiffs on July 23, 1975, plaintiffs Continental, Shell, Gulf, Phillips and Ashland filed a joint motion for partial summary judgment as to paragraphs B and C of the statute on August 10, 1975.

4. Discovery has actively proceeded and is complete.

5. Plaintiffs seek a declaratory judgment that Chapter 854 of the Laws of Maryland of 1974, amending Article 56, §157E of the Annotated Code of Maryland (as amended at the 1975 Session of the General Assembly by Chapter 608 of the Laws of Maryland of 1975 effective July 1, 1975) ("the Act"), is unconstitutional and invalid, and a permanent injunction prohibiting the defendants from enforcing the provisions of the Act against the plaintiffs. All

plaintiffs, except Exxon and Petroleum Marketing, (by their joint motion for partial summary judgment filed on August 10, 1975) seek a declaratory judgment that paragraphs B and C of the Act are not applicable to them or in the alternative are unconstitutionally vague.

6. The Maryland Act adds the following provisions to Article 56, §157E (the italic portions are those added by Chapter 608):

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
>
> (G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
>
> (H) The Comptroller may permit reasonable exception to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

II. *Jurisdictional Matters*

7. The defendant, Marvin Mandel, Governor of the State of Maryland, is charged under the Constitution of the State of Maryland with the responsibility of enforcing the laws of the State of Maryland.

8. The defendant, [illegible]is B. Burch, Attorney General of the State of [illegible]nd, is authorized to seek injunctions against perso[illegible] who [illegible]late Article 56 of the Annotated Code of Maryland.

9. The defendant, Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland, is charged

with the responsibility of administering the laws regulating the sale of petroleum products in the State of Maryland and of directing any persons willfully marketing petroleum products in the State of Maryland in violation of Article 56 of the Annotated Code of Maryland, and the rules and regulations promulgated pursuant thereto, to cease such violations.

10. Plaintiffs have no adequate remedy at law.

11. An actual controversy exists between the parties and antagonistic claims are present between the parties which will result in imminent and inevitable litigation. The controversy can be determined by a declaratory decree setting forth the rights of the parties and any other relief deemed proper by the Court.

III. *Definitions*

12. The following definitions are accepted for purposes of construing Chapter 854 of the Laws of Maryland 1974 in connection with this litigation only.

a. Retail service station dealer is defined in §157A of Article 56 and means any person, firm or corporation maintaining a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles.[1]

b. Motor vehicle is defined in §135 of Article 56 and means all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors, upon the public highways, and in the case of vehicles propelled by Diesel fuel or fuel

[1] Petroleum Marketing and Continental (Kayo) do not accept this definition.

oil, shall mean all such vehicles licensed to operate upon the public highways.

IV. *Stipulation of General Facts*

A. Legislative History of Chapter 854

13. By letter dated June 13, 1973, Governor Marvin Mandel formally requested Louis L. Goldstein, Comptroller of the Treasury, to conduct a study of gasoline retailing in Maryland to determine whether the shortage was real or contrived and to determine whether company-operated stations received more favorable allocations of gasoline than did independent dealers.

14. Pursuant to the Governor's request, a survey questionnaire requesting information on price changes, supply and allocation quotas, hours of operations, "voluntary allowances" and other types of "dealer aid" and sales limitations to customers, was prepared by the Gasoline Tax Division of the Comptroller's Office under the direction of Arthur E. Price, Chief Motor Fuel Inspector, and mailed on June 29, 1973, to 4,055 gasoline service station dealers within the State of Maryland.

15. 1,407 questionnaire returns, completed in whole or in part, or 34.7 percent of the 4,055 service station dealers sent questionnaires, were received by the Gasoline Tax Division. Based on comments received in those questionnaires, followup investigations were conducted involving approximately 100 dealers. The responses were tabulated on work sheets and a summary table entitled "Recap by Brand" was prepared. From the Recap and Work sheets, a written analysis of the survey results entitled "Results and

Analysis of Service Station Dealers Questionnaire" was prepared by Arthur Price. This analysis was submitted to Governor Mandel for his consideration on September 6, 1973.

16. Pursuant to the Governor's request of June 13, 1973, the Gasoline Tax Division of the Comptroller's Office prepared and mailed on July 17, 1973 a questionnaire to twenty oil companies in order to evaluate further the aforementioned request of Governor Mandel. This questionnaire requested information on company activity within the State of Maryland in the areas of: retail service station operations; new and planned service station construction; past and projected sales volumes; allocation formulas; closing of various types of stations; cancellation and/or nonrenewals of contracts; price increases to customers; elimination of voluntary allowances, rental abatements or other "dealer aid;" company policy regarding hours of operation of its branded service stations; and acquisition of new toll-road accounts for the period of June 30, 1972 through June 30, 1973.

17. Eleven oil companies responded, in whole or in part, to the oil company questionnaire. A written analysis of the survey results entitled "Analysis of Major Oil Compan[redacted]Questionnaires," was prepared by Arthur Price and John K. Coleman. This analysis was submitted to Governor Mandel for his consideration on September 28, 1973.

18. A written report entitled "Analysis of Comparative Report of Taxable and Exempt Gasoline Sales for the Calendar Year 1971, 1972, and the First Six Months of 1973" was submitted to the Governor by the Comptroller on September 6, 1973. This analysis

was prepared from the computer data collected by the Gasoline Tax Division.

19. At the instruction of the Comptroller, John K. Coleman, Chief, Gasoline Tax Division of the Comptroller's Office, drafted a bill purportedly to correct certain alleged inequities said to be based on the returns of the survey questionnaire sent to the retail service station dealers. The returns purportedly formed the basis for the report entitled "Results and Analysis of Service Station Dealers Questionnaire" which had been submitted to the Comptroller and sent to the Governor on September 6, 1973. A draft of the bill was sent to the Governor by Comptroller Goldstein on September 13, 1973.

20. After several discussions with the Governor and his staff, Comptroller Goldstein, by letter dated January 7, 1974, forwarded proposed legislation to the Governor's Office prohibiting producers, refiners, and wholesalers of petroleum products from operating retail service stations, requiring all such persons to extend all voluntary allowances and equipment rentals uniformly to all dealers throughout the State, and requiring that gasoline be apportioned uniformly to all dealers throughout the State.

21. Identical bills (House Bill 918, by Delegate Bonvegna and Senate Bill 465, by Senator Pine) were introduced in the two houses of the General Assembly during the 1974 session. These bills were the same as the draft bill prepared by John Coleman. Both the House and Senate bills were amended to limit the prohibition on the operation of retail service stations to producers and refiners, by deleting the term "wholesaler." In addition, paragraph G was added to both versions of the bill permitting the Comptroller to adopt

rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station. In addition, paragraph H was added to Senate Bill 465 permitting the Comptroller to grant exceptions to the divestiture dates specified by the statute.

22. Public hearings were held by both the Senate and House committees considering these respective bills. At the public hearing on S.B. 465 before the Senate Committee on Economic Affairs held on February 20, 1974, a total of 16 witnesses registered to appear and testify on the bill. Eight (8) opponents represented the following companies or associations: Exxon Corporation, BP Oil Corporation, Shell Oil Company, Southern Maryland Oil Co., Wise Petroleum Co., Blue Ridge Oil, Maryland Petroleum Association and Maryland Oil Jobbers Council. And a total of eight (8) witnesses appeared and/or registered to testify as proponents of the bill, including the Honorable Louis L. Goldstein, Comptroller, who testified and submitted copies of his Office's aforementioned reports to the Governor and to the Economic Affairs Committee for their review and consideration. At the public hearings on H.B. 918 before the House Economic Matters Committee held on March 7, 1974 a total of seven (7) witnesses registered to appear and testify on that bill.

23. Both bills were passed during the 1974 Session of the General Assembly, and Senate Bill 465 which eventually was to be signed into law was passed by a vote of 26-0 (17 absent – no votes), and in the House by a vote of 90-15 (37 absent no votes).

24. Prior to signing the bill into law, the Governor held a special veto hearing on S.B. 465 and H.B. 918 at which time he invited and received for consideration

the views of both proponents, as well as opponents of the legislation. At this special hearing before the Governor, which was held on May 29, 1974, a total of fifteen (15) witnesses appeared to testify on S.B. 465, of which number, seven (7) witnesses registered to appear and testify as opponents of the bill, representing five (5) oil companies, and the business community. Eight (8) witnesses registered to appear and testify as proponents of said bill. Senate Bill 465 was signed into law by Governor Mandel on May 31, 1974 and became Chapter 854 of the Laws of Maryland of 1974.

25. Chapter 854 of the Laws of Maryland was amended during the 1975 Session of the Maryland General Assembly by Senate Bill 797 which was enacted into law as Chapter 608 of the Laws of Maryland of 1975, adding to paragraphs B and C of the statute a further prohibition on operation of service stations by a producer or refiner under a contract with any person for management of a service station on a fee arrangement. The amendment requires that service stations be operated by a retail service station dealer.

B. Retail Marketing in Maryland

26. The consumer in Maryland is served by various kinds of gasoline service stations or outlets in terms of the products and services offered. They include major service centers, combination service station-car wash facilities, turnpike stations, truck stops, conventional service stations, limited service operations offering gasoline but no other driveway services, and full and partial self-service stations.

27. Retail stations are operated under various formats. There is the direct retailing of gasoline by the supplier, which the law being challenged in this suit

would prohibit insofar as that supplier is a producer or refiner of petroleum products. Such direct retailing occurs through operation of the supplier's facility by the supplier's employees, or by employees of a subsidiary company or division. The other major category of retail marketing is performed by independent dealers who operate service stations and resell gasoline sold to them by a supplier. Some individual dealers own their own service stations or lease them from a non-supplier and have a supply contract with a branded or unbranded supplier; others lease a station from a supplier who also supplies them with product.

28. According to the records of the Gasoline Tax Division of the Comptroller's Office, there were approximately 3,995 retail stations in the State of Maryland on December 31, 1972, 3,798 retail stations on December 31, 1973, and 3,757 retail stations on July 1, 1974.

29. The following tables contain an enumeration of the number of retail gasoline stations in the State of Maryland as of July 1, 1974 classified according to supplier of the gasoline, brand name of the gasoline sold, and type of operation (i.e., company operated or dealer operated):

Table A

RETAIL GASOLINE STATIONS IN MARYLAND
OPERATED BY PRODUCERS OR REFINERS*
July 1, 1974

Company	Number of Company Operated Stations
Amerada Hess Corporation	3
Amoco Oil Company	1
Ashland Oil, Inc.	19
Atlantic Richfield Company	6
BP Oil, Inc.	42
Chevron Oil Company (Standard Oil Co. of Calif.)	0
Cities Service Oil Company	2
Kayo Oil Company (Continental Oil Co.)	16
Crown Central Petroleum Corporation	2
Exxon Corporation	36
Getty Oil Company, Eastern Operations, Inc.	0
Gulf Oil Corporation	1
Mobile Oil Corporation	2
Phillips Petroleum Company	13
Petroleum Marketing Corporation (Commonwealth Oil Refining Co.)	21
Shell Oil Company	1
Southern States Cooperative, Inc.	14
Sun Oil Company of Pennsylvania	0
Texaco Oil Company	0
Texaco, Incorporated	0
Union Oil Company of California	0
	179

* For purposes of this table, the term "producer" is defined to mean a person, firm or corporation engaged in obtaining crude oil and "refiner" is defined to mean one engaged in refining crude oil into motor vehicle fuels, or a subsidiary of a "producer" or "refiner".

Table B

RETAIL GASOLINE STATIONS IN MARYLAND
BY BRAND NAME
July 1, 1974

Brand Name	Company-Affiliation	Company-Operated	Non-Company-Operated	Total
Alert	*Exxon	4	0	4
Amoco	*Amoco	1	618	619
Arco	*Atlantic Richfield	6	217	223
Bi-Lo	*Ashland	2	0	2
BP Gas and Go	*BP Oil	42	6	48
Checker	*United Refining	14	13	27
Chevron	*Chevron	0	51	51
Citgo	*Cities Service	2	263	265
Crown	*Crown Central	2	35	37
Exxon	*Exxon	32	596	628
Fisca	Fisca Oil Co.	5	0	5
Giant Food	Giant Food	2	0	2
Getty	*Getty	0	120	120
Gulf	*Gulf	1	218	219
Hess	*Amerada Hess	3	24	27
Hi-Pi	*Ashland	3	0	3
Hi-Way	Hi-Way Oil, Inc.	5	0	5
Homoco	Homes Oil Co.	7	4	11
Hudson	Hudson	2	0	2
Kayo	*Kayo	16	0	16
Midway	Midway Petroleum	5	5	10
Mobil	*Mobil	2	181	183
National	National Oil	0	9	9
Pantry Pride	Pantry Pride	1	0	1

*Indicates a "producer" or "refiner" as defined in Table A.

Brand Name	Company-Affiliation	Company-Operated	Non-Company-Operated	Total
Payless	*Ashland	2	0	2
Phillips 66	*Phillips	10	108	128
Red Head	*Ashland	12	0	12
Saveway Marit	*Meadville	12	0	12
Savon	Savon Gas Stations	6	0	6
Scot	*Petroleum Marketing	21	0	21
Sears	Sears Roebuck	3	0	3
Shell	*Shell	1	283	284
Southern States Cooperative	*Southern States Cooperative	14	0	14
Sunoco	*Sun Oil	0	225	225
Tenneco	*Tenneco	0		
Texaco	*Texaco	0	307	307
Union 76	*Union Oil	0	152	152
Wards	*Montgomery Ward	4	0	4
Way-Lo	*Phillips	3	0	3
William Penn	*BP Oil	0	112	112
		233	3547	3780

There are these additional brands of gasoline sold in the State of Maryland for which there are no figures available as to the number of stations: Ex-Val, Gas for Less, Penney, Pennzoil, Press, Quaker, Thornton, Thrifty, and Triangle.

According to the records of the Gasoline Tax Division of the Comptroller's Office, there were a total of 3,757 retail gasoline service station dealers in the State of Maryland as of July 1, 1974.

30. The following table shows the percentage of taxable sales of motor vehicle fuel sold within the State of Maryland by company for the period 1969 through August, 1975 based on taxable motor vehicle fuel sales as reported to and taken from the records of the Gasoline Tax Division of the Comptroller's Office. Taxable sales include transactions other than ultimate retail sales to the consumer, and therefore do not necessarily reflect actual percentages of retail sales to the consuming public.

Table C

Percentage of Taxable Motor Vehicle Fuel Sales
in Maryland by Oil Company

1969 - August 1975

Oil Company	1969	1970	1971	1972	1973	1974	1975
Agway	0.0029	0.0040	0.0044	0.0031	0.0037	0.0055	0.0072
Amoco	10.7945	10.6553	10.7350	10.4902	10.2553	10.1315	10.1564
Arco	3.6311	3.5996	3.8684	3.4544	3.7275	3.5542	3.5587
Ashland	2.2588	2.4660	3.2261	3.6271	2.6757	2.7968	3.1549
BP	5.6032	7.9692	7.3590	7.1582	6.1087	5.0831	5.9871
Chevron	0.2795	0.2522	0.2499	0.2616	0.3374	0.3695	0.4344
Citgo	4.2957	4.4425	4.2844	3.8818	3.8125	4.5257	4.2991
Coastal States	0.0000	0.0000	0.2356	0.1593	0.1429	0.1140	0.1077
Continental	0.9439	2.6515	1.8894	1.1948	1.2291	1.1292	0.8567
Crown	2.2357	2.6290	3.1069	3.8731	4.9419	6.2600	6.4427
Exxon	20.0125	19.5171	18.4651	17.5610	19.4841	18.9519	19.4489
Getty	0.7924	0.7916	0.9466	0.9878	0.9332	0.9057	0.7661
Gulf	8.9188	7.7582	7.0727	7.6306	7.8683	8.6302	8.0601
Hess	2.7360	3.0456	3.3963	3.5684	3.9327	3.5405	3.2640
Louisville Ref.	0.3750	0.3633	0.2669	0.1917	0.1863	0.0906	0.1362
Mobil	3.3885	3.3197	3.4995	3.5516	3.5432	3.5488	3.2130
Pet. Marketing	1.1628	0.1533	1.6170	2.8065	2.2136	1.5832	1.5987
Phillips	1.7671	1.7457	1.9211	2.0496	1.7393	1.8675	2.0698
Shell	9.5043	9.5510	9.1651	8.9378	8.9837	8.8347	8.3825
Sinclair	2.4308	0.1030	0.1346	0.0000	0.0000	0.0000	0.0000
Southern States Coop.	1.1610	1.1412	1.1346	1.1469	1.1640	1.0027	1.2459
Sunoco	5.7773	5.6522	5.9209	5.9259	5.6769	5.8645	5.3563
Tenneco	0.9906	1.3338	1.0105	0.8969	0.6635	0.8570	0.7362
Texaco	7.0584	7.9874	7.9028	8.1416	7.6746	7.5190	7.4773
Union	1.1160	1.2356	1.0462	0.7427	0.7623	0.8812	1.0279
Multiple Source	2.7630	1.6319	1.6755	1.7574	1.9397	1.9569	2.2124
	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %	100.00 %

V. *Stipulation of Facts pertaining to Individual Plaintiffs to which the Defendants Have Stipulated*

Appendix A – Exxon

Appendix B – Kayo

Appendix C – Shell

Appendix D – Gulf

Appendix E – Phillips

Appendix F – Petroleum Marketing

Appendix G – Ashland

* * * * * *

Entered this 9th day of October, 1975.

E. Mackall Childs,
Judge.

(Signatures of Counsel)

APPENDIX A
Stipulation of Facts Pertaining to Exxon

1. Exxon Company, U.S.A., a division of Exxon Corporation hereinafter referred to as "Exxon") was formed effective January 1, 1973, and operates the business interests formerly operated by Humble Oil & Refining Company.

2. Exxon is a company involved in exploration for and production of crude oil and natural gas and in the refining, transporting and marketing, at both the

wholesale and retail levels, of a wide range of petroleum products.

3. Insofar as petroleum products are concerned, operations by Exxon in Maryland are limited to distribution and marketing.

4. Exxon has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Exxon branded gasoline in the State of Maryland have all of their gasoline supplied from outside the state.

5. Gasoline sold under the Exxon brand in the state of Maryland normally comes from Exxon's refineries at Baytown, Texas, and Baton Rouge, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Crude oil refined at Baytown normally comes from Texas, Alabama, Florida, and foreign sources. Crude oil refined at Baton Rouge normally comes from Texas, Louisiana, Mississippi, Alabama, Florida and foreign sources.

6. Gasoline produced at these two refineries is transported to two primary terminals which supply customers in Maryland. These primary terminals are located in Fairfax, Virginia and Baltimore, Maryland. The gasoline is normally brought to the Fairfax terminal by common carrier pipeline, the Plantation Pipeline System, from the Baton Rouge refinery. In 1973, approximately 118,500,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal also supplies gasoline to customers in Virginia and Washington, D.C. The Baltimore terminal is normally supplied from the Baytown refinery by tanker. In 1973 approximately 210,000,000 gallons of gasoline were supplied to Maryland customers from this terminal. This terminal

also supplies gasoline to customers in Pennsylvania, Virginia and West Virginia.

7. Exxon maintains one secondary terminal in Maryland, at Salisbury. The secondary terminals at Easton and Hagerstown have been closed since Exxon filed its Bill of Complaint. The Salisbury terminal is supplied by barge or tank truck from the Baltimore terminal. In addition, a terminal at Norfolk, Virginia has on occasion supplied Exxon brand gasoline for portions of the lower Chesapeake Bay area of Maryland. The Easton, Hagerstown, Salisbury, and Norfolk terminals accounted for approximately 29,000,000 additional gallons of gasoline to Maryland customers in 1973.

8. The majority of Exxon brand motor oil sold in Maryland comes from the Baytown and Baton Rouge refineries where the base stock is made. It is shipped by tanker to Bayonne, New Jersey, where it is blended into motor oil with additives, which are made at Bayonne. It is then barged to the Baltimore plant where it is canned and trucked to customers. The vast majority of greases sold in Maryland at Exxon company-operated stores and at various Exxon dealer service stations come from Exxon's plant in Pittsburgh, Pennsylvania.

9. Antifreeze, spark plugs, tires, batteries and accessories sold at company-operated stations and at various Exxon dealer stations in Maryland are manufactured by other companies at various places outside the State of Maryland and shipped into Maryland by truck and rail.

10. Exxon operates four stations in Maryland selling gasoline under the Alert brand. These stations are

supplied by refineries, other than those of Exxon, located outside the State of Maryland. Prior to June 4, 1974 the product was acquired primarily from Crown Central Petroleum Corporation. Since then, the Alert stations have been primarily supplied by BP Oil Corporation.

11. Exxon does not engage in any producing of motor vehicle fuels in the State of Maryland.

12. As of December 31, 1973 Exxon branded gasoline was sold at approximately 25,400 retail outlets located in forty-five states and the District of Columbia.

13. Exxon began marketing operations in Maryland in 1916. Exxon sells substantial quantities of gasoline and other petroleum products and other goods and services at the retail level both in local markets in Maryland and also to persons, such as interstate travelers, common carriers, airlines, and the shipping industry, operating exclusively in interstate commerce in Maryland.

14. As of July 1, 1974, Exxon had 36 company-operated stations in Maryland, representing approximately 6.7% of the 532 direct served[1] Exxon branded service stations in Maryland. This represents a decline from 57 company-operated stations in Maryland as of December 31, 1971 or approximately 9.2% of the 620 service stations at that time.[2]

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[1]Those service stations operated by independent dealers or by company personnel which receive their product directly from Exxon, as distinguished from those stations which are supplied by companies which purchased Exxon brand gasoline and resold it. The latter companies are generally known as resellers.

[2]Exxon has traditionally marketed its gasoline primarily through independent retailers and wholesalers rather than

[footnote continued]

15. As of December 31, 1973, Exxon had 356 stations operated by lessee dealers in Maryland. As of December 31, 1974, Exxon had 326 stations operated by lessee dealers in Maryland.

16. At the end of 1973, Exxon had approximately 140 contract dealers in Maryland. At the end of 1974, Exxon had approximately 133 contract dealers in Maryland.

17. Exxon currently has 30 branded resellers in Maryland. Exxon has no direct knowledge of the exact number of Exxon branded outlets through which the resellers sell their products or to the extent to which other products and services are offered by those facilities.

18. Exxon markets its products nationally and in Maryland through the full range of retail facilities described in paragraph 26 of this Pre-Trial Order. In Maryland, Exxon had 11 Car Care Centers (one of which is combined with a car wash facility), one full self-service station, one turnpike station, and four limited service stations selling gasoline under the Alert brand. The remainder of the 532 direct served Exxon branded service stations in Maryland as of December 31, 1973 are conventional facilities.[3]

19. The Car Care Centers in Maryland have from 7 to 12 bays as compared with 2 to 4 bays of the typical

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through company operations. As of December 31, 1973, Exxon operated with company personnel 933 service stations nationwide. These stations represent approximately 3.7% of the approximately 25,400 Exxon retail outlets.

[3]As of July 1, 1974, Exxon had 123 major service centers nationwide which operate under the logo Exxon Car Care Center and had 74 full self-service stations nationwide.

conventional service station and the cost of investment is substantially higher. They are specifically equipped and manned for repair and maintenance work. Their service work capability usually includes alignment and front-end repairs, brake work, exhaust system work, tune-up, shock absorber and universal joint replacement, air-conditioning service and repair, cooling and heater system service and repair, fuel system work, ignition work, and power train-transmission service. In addition to these maintenance and repair services, the Car Care Center provides the consumer with a full line of tires, batteries, and automobile accessories. The Car Care Center concept was developed by Exxon to participate in the expanding market for automobile repair and services. The repair services provided at those Centers are guaranteed a any Car Care Center in the nation, not just the one which issues the warranty.

20. The following is a list of specialized equipment found at a "Car Care Center":

1. Start-a-Car Unit
2. Fuel pump tester
3. Bearing press package-17 ton
4. Wheel puller package including drivers, etc.
5. Brake shop-combination
6. Acetylene gas welding unit
7. ARC welding unit
8. Custom wheel adapter kit to handle all cars
9. Grand Prix adapter for ETC-10
10. Wheel bearing packer
11. Parts cleaner-air operated
12. Power washer package complete
13. Jacks-lifting package
14. Screw type stand 64" to 83" height 500 lb. rating-used for lifting

15. Brake stool
16. Air filter tester
17. PCV valve tester
18. Compression tester
19. Head gasket leak detector
20. Mechanics stethoscope
21. Inspection mirror
22. Brake Analyzer-dynamic
23. Static front end alignment
24. Alignment lift
25. Headlight tester

21. The following chart identifies the initial investment by Exxon in all of Exxon's existing company-operated stations in Maryland based upon dollar values at the time of the original investment by Exxon, broken down according to land, building and equipment.

EXXON'S INVESTMENT IN COMPANY-OPERATED STATIONS IN MARYLAND

		Type Station	Year Opened	Land	Buildings	Equipment	Total
1.	4434 Falls Road Baltimore, Md. 21211	Car Care Center	1966	$ 16,300	$ 86,200	$ 53,100	$155,600
2.	616 Frederick Road Baltimore, Md. 21228	Car Care Center	1969	113,600	129,300	49,300	292,200
3.	513-25 W. Mulberry Baltimore, Md. 21201	Conventional	1971	154,400	157,100	26,800	338,300
4.	6201 N. Charles Street Baltimore, Md. 21212	Conventional	1971	143,700	67,300	22,300	233,300
5.	1204 Reisterstown Road Pikesville, Md. 21208	Conventional	1974	45,100	39,100	17,700	101,900
6.	St. Rts. 26 & 32 Eldersburg, Md. 21784	Conventional	1971	290,600	109,400	37,200	437,200
7.	10840 Pulaski Highway White Marsh, Md. 21162	Conventional	1970	237,600	111,000	35,600	384,200
8.	11101 Georgia Avenue Wheaton, Md. 20902	Conventional	1971	-1	106,700	26,000	132,700
9.	6122 Edmondson Avenue Baltimore, Md. 21228	Conventional	1971	34,900	50,600	20,300	105,800
10.	6501 Pulaski Highway Baltimore, Md. 21237	Conventional	1970	11,200	40,500	25,700	77,400
11.	3220 Erdman Avenue Baltimore, Md. 21213	Car Care Center	1966	45,700	102,300	41,900	189,900
12.	5501 Park Heights Avenue Baltimore, Md. 21215	Car Care Center	1967	299,900	136,500	50,500	486,900
13.	1400 York Road Lutherville, Md. 21093	Car Care Center	1967	50,600	180,300	105,600	336,500

		Type Station	Year Opened	Land	Buildings	Equipment	Total
14.	Goldsboro & MacArthur Blvd. Glen Echo, Md. 20016	Conventional	1971	$ 56,200	$ 54,800	$ 16,000	$127,000
15.	900 E. Taylor Avenue Baltimore, Md. 21204	Car Care Center	1958	81,700	96,100	42,500	220,300
16.	1801 Gwynns Oak Avenue Baltimore, Md. 21207	Car Care Center	1966	47,000	88,200	38,100	173,300
17.	6200 Belair Road Baltimore, Md. 21206	Car Care Center	1967	168,100	119,600	48,100	335,800
18.	J. F. Kennedy Hwy. Aberdeen, Md. 21001	Turnpike	1963	-1	-1	67,400	67,400
19.	8029 Liberty Road Baltimore, Md. 21207	Car Care Center	1968	185,100	122,800	44,600	352,500
20.	4785 Allentown Road Camp Spring, Md. 20023	Conventional	1971	169,600	74,600	32,900	277,100
21.	8901 Central Avenue Capitol Heights, Md. 20027	Conventional	1972	31,800	95,600	37,100	164,500
22.	Rts. 50 and 450 Annapolis, Md. 21401	Conventional	1970	142,200	83,800	33,200	259,200
23.	5500 Norbeck Road Rockville, Md. 20853	Conventional	1970	-1	20,100[1]	19,500	39,600
24.	10611 Little Patuxent Pkwy. Columbia, Md. 21043	Car Care Center- Car Wash	1971	548,600	268,000	104,800	921,400
25.	7953 Washington Blvd. Waterloo, Md. 20794	Conventional	1970	148,500	81,900	25,600	256,000
26.	Mountain & Woods Roads Pasadena, Md. 21122	Conventional	1970	111,600	85,500	29,000	226,100

	Type Station	Year Opened	Land	Buildings	Equipment	Total
27.	1500 Sandy Spring Road Laurel, Maryland 20810	Conventional	1970	$187,500	$102,200	$ 40,500	$330,200
28.	301 Hungerford Drive Rockville, Md. 20850	Car Care Center	1972	403,600	394,400	67,800	865,800
29.	7253 Washington Blvd. Elkridge, Md. 21227	Conventional	1971	89,300	85,900	32,300	207,500
30.	Mountain & Old Annapolis Roads. Glen Burnie, Md. 21061	Conventional	1972	-1	152,700	49,900	202,600
31.	U. S. Rt. 1 & Md. 147 Benson, Md. 21018	Self-Service	1973	240,200	76,600	38,200	355,000
32.	2500 N. Howard Street Baltimore, Md. 21218	Conventional	1970	165,000	75,000	21,500	261,500
33.	8538 Liberty Road Randallstown, Md. 21133	Alert	1972	315,000	115,000	-2	430,000
34.	2100 S. Hanover Street Baltimore, Md. 21230	Alert	1972	-1	146,000	-2	146,000
35.	Ritchie Hwy. & Rt. 710 Glen Burnie, Md. 21061	Alert	1973	252,000	142,000	-2	394,000
36.	3023 Hammonds Ferry Rd. Lansdowne, Md. 21229	Alert	1973	74,000	101,000	-2	175,000

/1. The land and part or all of the improvements are leased by Exxon.

/2. These stations contain no investment in equipment.

22. The following table shows the volume of gasoline in thousands of gallons sold through Exxon branded stations in Maryland in 1973:

Total[1]	Company Operated	% of Total	Non-Company Operated[2]	% of Total
344,921.9	54,190.0	15.7%	290,731.9	84.3%

23. The following table shows the volume of motor oil, tires, and batteries sold through direct served Exxon brand stations in Maryland during 1973:

	Total	Company Operated	% of Total	Non-Company Operated[2]	% of Total
Motor Oil (gallons)	1,184,100	157,600	13.3%	1,026,500	86.7%
Tires (units)	85,891	11,831	13.8%	74,060	86.2%
Batteries (units)	27,850	4,378	15.7%	23,472	84.3%

24. In 1973 Exxon had retail sales at company-operated stations of $928,450 in house brand accessories, and $690,860 in other accessories and had labor revenue of $1,256,801. This is in comparison with wholesale sales by Exxon of house brand accessories to non-company operated stations of $1,110,905. Figures for other accessories and labor revenue at non-company-operated stations are not available to Exxon.

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[1] Includes 25,280,000 gallons sold by Exxon to resellers in Maryland in 1973.

[2] These figures reflect only wholesale sales by Exxon to noncompany operated stations. The dealers at these stations purchase additional quantities of these products from other sources and sell them at retail.

25. There is presently in force a contract between Exxon Corporation and the Maryland Transportation Authority dated November 15, 1973 for the operation of a gasoline service station at the turnpike facility at the Maryland House located on the John F. Kennedy Memorial Highway. The contract is for a period of five years with a right of renewal for an additional five years. The contract contains the following provisions, among others, concerning the operation of the facility:

a. Exxon agrees to operate the service station in a highly efficient manner, and to conduct its operations in accordance with the highest standards of management for service stations, to the end that the public may be served in the best possible manner and that public esteem may be won for Exxon, its service and products, and for John F. Kennedy Memorial Highway.

b. Prices charged for goods and services sold at the service station shall be no higher than, and the quality thereof shall be at least equal to, the prices and quality prevailing at service stations in the same general vicinity which are owned and operated by oil companies.

c. Exxon shall supply free service at least equal to such service supplied by service stations in the general vicinity which are owned and operated by oil companies.

d. Exxon is to operate the service station 24 hours a day every day of the week. Ample provision is to be made by Exxon for speedy and convenient handling of patronage during all hours.

e. Exxon shall have a sufficient number of trained and uniformed attendants on duty at all

times to conduct properly the business of a gasoline service station. All employees of Exxon working on the premises must be thoroughly familiar with the location of interchanges in order to direct motorists, intelligently, and they must know the emergency services, including doctors, hospitals, and ambulances, available in the general vicinity of the service area.

f. Exxon is to furnish roadside service for disabled vehicles, including two modern service trucks of good appearance and in first class mechanical condition available 24 hours a day on standby service. Exxon shall perform its duties in such a manner as to furnish adequate call service to highway patrons within 20 minutes from the time Exxon is notified. The equipment operators must at all times be courteous and present a clean and neat appearance. They shall obey and respect all rules and regulations of the Authority. The Operator shall encourage each equipment operator to obtain a certificate of completion of the standard 22-hour Red Cross first-aid training course when and if practical and shall permit operators to attend such course during regular working hours without deduction from such operator's pay, when and if arrangements can be made for such training.

26. The following is a list of innovative marketing concepts or products tested at stations operated by Exxon in Maryland and elsewhere, with an explanation of each concept or product.

1. *Partial self service.* Several years ago Exxon tested self-service operation at one island in a number of company-operated stations in different

markets. This experiment lasted for some two or three years. When, in Exxon's opinion, it was found to be successful and the techniques adequately developed, Exxon encouraged dealers to consider partial self-service where legal and suitable in order to enable them to compete for a broader spectrum of customers. Exxon made the program available to dealers upon request at no cost. Exxon's cost was approximately $750 per station. Among the problems and issues dealt with during this experiment were the following: a) the type of equipment and collection system which is most convenient and acceptable to the motorist; b) the most effective means of communicating to the motorist as he enters the station that one island is self-service and the other is full service; c) special problems which arise in the operation; d) whether credit cards should be accepted at the self-service island; e) the number of customers who convert from full service to self-service. In Exxon's opinion the resolution of these kinds of issues could only be accurately obtained by close control of operating procedures and monitoring of the results, best performed at company-operated stations.

2. *Valucenter advertising and promotion.* The valucenter concept of cooperative advertising and sales promotion was tested at Car Care Centers and after, in Exxon's opinion, proving successful, was expanded to include dealers who wished to participate.

3. *Manning guidelines.* During the gasoline shortage in 1973, new manpower productivity guidelines were developed at direct operated stations and were passed on to dealers, as

counseling guidelines, through the sales representatives. These guidelines would, in Exxon's opinion, assist a dealer in controlling his largest expense – manpower – during the time of shorter hours and fewer days and, at the same time, help to maximize customer convenience.

4. *Certification of mechanics.* The National Automotive Institute for Service Excellence (NAISE) and automobile manufacturers decided to certify mechanics through their organization as being competent for repairing automobiles. Initially, this program would have included only mechanics of automobile dealers. As a result of being in the Car Care Center business, Exxon, with the help of the American Petroleum Institute, was able to get NAISE to expand the program to include service station mechanics. Further, through the experience of its Car Care Center mechanics taking the test of certification, Exxon was able to advise its dealers of the kinds of training needed prior to taking the tests and also was successful in getting the certification of mechanics by NAISE broken down into about eight categories of expertise rather than having only one category of Master Mechanic.

5. *Automotive exhaust emission.* As a result of operating Car Care Centers, Exxon became interested in testing various manufacturers' equipment which is designed to test the exhaust emissions of automobiles. In Exxon's opinion some of the equipment was found to be reasonably acceptable. Others were found to have problems. With the help of a research division of Exxon, the Company was able to develop reasonable equipment and

procedures for testing exhaust emissions. Subsequently, the State of New Jersey required automobiles licensed in that state to be inspected and adjusted to a minimum level of exhaust emissions. As a result of Exxon's work in its company-operated stations, Exxon was able to qualify quickly all such stations in New Jersey and many of its dealers to the extent that they were licensed by the State of New Jersey to conduct these tests and make necessary adjustments to the customer's car. With about 15% of the service stations in New Jersey, Exxon had better than 50% of those licensed by the State to test exhaust emissions.

6. *In-bay car wash units.* A number of in-bay units were tested at company-operated stations. As a result Exxon was able to advise its dealers as to which pieces of equipment to avoid and which to use and at the same time developed a set of operating guidelines which were made available to dealers.

7. *Add-on air conditioners and tape decks.* Exxon tested the sale of these items at company-operated stores and found that, in Exxon's opinion, they were highly expensive items and that the degree of expertise needed to actively compete with specialty stores in these items made them non-profitable. As a consequence, Exxon advised its dealers to avoid these items of merchandise.

8. *Exact cash or credit card after dark.* Due to the high incidence of robberies at service stations, the company tested a procedure of accepting only cash in the exact amount of the purchase or credit cards for sales made after dark. This program

subsequently was offered to Exxon dealers, and the incidence of robberies at stations which adopted this practice has declined significantly.

9. *Automotive repair and diagnostic equipment.* The company tested various types of repair and diagnostic equipment at Car Care Centers and planned to recommend types of equipment and procedures to its dealers. Automobile diagnosis at the time of this test was, in Exxon's opinion, a popular item in the marketplace. The dynamometer, a loaded mode diagnostic equipment device, was very expensive and difficult to utilize profitably. Consequently, the company dropped this kind of equipment at company-operated stores and did not recommend to its dealers to participate in this effort. Exxon has tested idle mode diagnostic equipment, and is currently preparing to test muffler diagnostic equipment. Various types of automotive repair equipment have also been tested at company-operated stations, including, for example, those for front-end alignment.

10. *Motor oil vending machines.* Motor oil vending machines were tested at full self-service company-operated service stations. The negative results from the test led Exxon to advise dealers not to invest in the machine.

27. Exxon recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it does, in order to meet competition from other suppliers, temporarily reduce its wholesale price or grant temporary allowances to its

dealers or resellers without making price reductions or allowances throughout the State.

28. The normal business practice of Exxon is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

29. Some of Exxon's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including, for example, the District of Columbia and West Virginia.

30. Exxon is not aware of any violations of law by Exxon in the use of any voluntary allowances in the State of Maryland.

31. Exxon has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications for various reasons.

32. When Exxon leases a service station facility to a dealer, such Exxon owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Exxon owned equipment, such as identification signs and credit card imprinters, are separately rented to the dealer.

33. An investigation was conducted on January 29 and 30, 1974 by auditors of the Gasoline Tax Division of the Comptroller's Office, Early W. Bates and Charles C. Downs, to determine whether the allocation of gasoline by Exxon to some 30 stations selected at random by the auditors was fair and equitable. These auditors conducted a subsequent investigation on February 19 and 20, 1974 to review the allocation to Exxon's company-operated stations. The conclusion

reached by the auditors upon the completion of their investigations was that Exxon was allocating its supply to dealers properly vis-a-vis its company-operated stations.

(signature of Counsel:)

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APPENDIX B
Statement of Facts Pertaining to
Continental Oil Company
and
Kayo Oil Company

1. The Continental Oil Company (hereinafter referred to as "Continental") is a Delaware Corporation which was formed effective October 8, 1920. The duration of its charter is perpetual. The stock of Continental is publicly held and traded. Its principal

offices are located in Houston, Texas, Stamford, Connecticut and Ponca City, Oklahoma.

2. Continental is a company involved in exploration for and production of crude oil and natural gas and in the refining, transportation and marketing, at both the wholesale and retail levels, of a wide range of petroleum products.

3. Continental does not produce or refine petroleum products or motor vehicle fuels in Maryland.

4. Continental does not have any independent service station dealers in Maryland. It does not sell branded "Conoco" gasoline in that state.

5. The petroleum products which Continental brings into the State of Maryland are refined by it at its Westlake, Louisiana refinery. The petroleum products are then transported through the Colonial Pipeline to Continental's Baltimore terminal. Continental's products (gasoline and distilates) are sold to purchasers doing business in Maryland as well as to purchasers located in states other than Maryland, such as Pennsylvania, Virginia and the District of Columbia. With respect to the purchasers doing business outside of the State of Maryland, a substantial part of the volume is delivered by Continental by its own trucks or common carriers engaged in interstate commerce.

6. The petroleum products distributed by Continental within the State of Maryland are received from the Colonial Pipeline, in that no other significant volume of petroleum products are received from any other transportation sources. The petroleum products sold in Maryland through the filling stations operated by Kayo Oil Company and the petroleum products sold to Continental's wholesale customers at its Baltimore

terminal, through the Onco Division of Continental Oil Company, receive no additives at Continental's Baltimore terminal of the Colonial Pipeline. The only additives that are added to Continental's product are pipeline corrosion and oxidation inhibitors which are added at Continental's Louisiana refinery, prior to transportation through the Colonial Pipeline into the State of Maryland.

7. As of June 30, 1975, Continental employed 225 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 – $3,350,000.00
1972 – $2,650,000.00
1973 – $2,610,000.00
1974 – $3,136,000.00

8. Continental sold to wholesale purchasers from its Baltimore terminal, excluding petroleum products distributed to Kayo Oil Company, the following amount of petroleum products for the years 1970 through the first seven months of 1975:

1970 – 12,457,000 gals.
1971 – 14,573,000 gals.
1972 – 13,207,000 gals.
1973 – 13,214,000 gals.
1974 – 15,706,000 gals.
1975 – 9,903,000 gals.
(7 mos.)

9. Continental owns 100% of the capital stock of the Kayo Oil Company (hereinafter referred to as "Kayo").

10. Kayo is a Delaware corporation formed effective April 29, 1959. The duration of its charter is perpetual. Its principal and only office is located in Chattanooga, Tennessee.

11. Kayo is a gasoline marketing company and, therefore, has neither producing or refining capacity, nor terminals or bulk plants.

12. Kayo is a large private brand retail marketer of gasoline.

13. Kayo has 80 supervisory districts and each district is under the supervision of a manager. The manager has no staff and no separate or private office. He works out of one of the gasoline stations located within his district. Kayo has 16 area managers (the area manager supervises approximately 5 districts). The area managers have no staff working for them and also operate out of gasoline stations located within the area. Most, if not all, of Kayo's management have worked their way up to supervisory positions through promotions within the organization.

14. Kayo qualified to do business in the State of Maryland on January 10, 1964. Kayo presently operates 14 filling stations in Maryland. There are six Kayo stations in Baltimore City and eight filling stations located in various other counties in Maryland.

15. Kayo obtains all of its gasoline which it sells at its retail outlets in Maryland from Continental. The gasoline is distributed to Kayo by Continental from Continental's Baltimore terminal, by means of Continental's trucks and common carriers, after the same has been shipped to the Baltimore terminal through the Colonial Pipeline.

16. Kayo does not produce or refine petroleum products or motor vehicle fuels in Maryland.

17. Kayo's Maryland stations were either built from the ground up by Kayo or were stations purchased by Kayo and structurally modified to conform to the Kayo

system of retail marketing. Kayo's investment in its existing company owned and operated stations in Maryland is as follows, as of June 30, 1975 – $676,525.00.

18. In 1972, 14,964,980 gallons of gasoline were sold by Kayo stations in Maryland; in 1973, 15,952,928 gallons of gasoline were sold by Kayo stations in Maryland; in 1974, 13,396,566 gallons of gasoline were sold by Kayo stations in Maryland; and during the first half of 1975, 6,550,868 gallons of gasoline were sold by Kayo stations in Maryland.

19. The comparative sales by Continental to its wholesale purchasers from its Baltimore terminal and the total number of gallons of gasoline sold by Kayo stations in Maryland are set forth in the following table:

Year	Continental Sales to Wholesalers	Kayo Sales to the Public
1972	13,207,000 gals.	14,964,980 gals.
1973	13,214,000 gals.	15,952,928 gals.
1974	15,706,000 gals.	13,396,566 gals.

20. As of June 30, 1975, Kayo employed 85 persons in its marketing operations in Maryland. Its total payroll in the State of Maryland for the years 1971 through 1974 was, for each year, as follows:

1971 – $500,000.00
1972 – $568,000.00
1973 – $405,000.00
1974 – $310,079.00

APPENDIX C

Facts Particular to Shell

1. Shell Oil Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices at One Shell Plaza, Houston, Texas.

2. Shell Oil Company (hereinafter referred to as Shell) was incorporated on February 8, 1922.

3. Shell is a company involved in exploration for and production of crude oil and natural gas and in the refining of crude oil, and the transportation and marketing, at both the wholesale and retail level, of a wide range of petroleum products.

4. Shell branded gasoline is sold at approximately 8,900 direct-served retail outlets located in 40 states and the District of Columbia.

5. Shell has no crude oil production or petroleum refineries in Maryland. Consequently, purchasers of Shell branded gasoline in the State of Maryland have all of their gasoline supplied from outside the State.

6. Gasoline sold under the Shell brand in the State of Maryland primarily comes from Shell's refineries at Deer Park, Texas and Norco, Louisiana. The crude oil refined at these two refineries comes from both domestic and foreign sources. Domestic crude oil refined at Deer Park primarily comes from Texas and Louisiana. Domestic crude oil refined at Norco primarily comes from Louisiana.

7. Gasoline produced at Deer Park, Texas and Norco, Louisiana refineries is transported to two terminals which supply customers in Maryland. These terminals

are located in Springfield, Virginia and Wagner's Point, Maryland. The gasoline is normally brought to the Springfield terminal by common carrier pipeline and to the Wagner's Point terminal by tanker.

8. The majority of Shell brand motor oil sold in Maryland comes from the Deer Park and Norco refineries where the base stock is made.

9. As reflected in the Motion For Partial Summary Judgment filed August 6, 1975, Shell does not believe that it is engaged in producing, blending or compounding motor vehicle fuels in the State of Maryland. Prior to distribution from Shell's Springfield, Virginia and Wagner's Point, Maryland terminals, additives are injected into gasoline and, in those rare instances when the product quality does not meet specifications, some premium gasoline is added.

10. All of the petroleum products sold by Shell at retail to the public in the State of Maryland are transported into the State of Maryland in interstate commerce.

11. Shell markets its products nationally through the full range of retail facilities. As of June 30, 1975, Shell operated 180 tunnel car wash stations, 135 self-serve stations, 15 gasoline only stations, 4 self repair stations and 50 conventional full service stations nationwide.

12. Shell has traditionally marketed its gasoline through independent retailers and wholesalers rather than through company operations. As of June 30, 1975, Shell operated with company personnel 384 service stations nationwide, representing approximately 4.3 percent of the approximately 8,900 Shell direct-served retail outlets.

13. As of June 30, 1974, Shell had 1 company-operated facility in the State of Maryland, representing approximately 0.5 percent of all directly operated facilities in Maryland at which Shell branded petroleum products were sold.

14. Shell's one company operated Maryland facility is a conventional full service station. Shell's initial investment in that station, based upon dollar values at the time of original investment, was $49,285 for improvements, $36,630 for equipment and $12,800 for the 1973 ground lease rental payments; the lease for that property extends through 1988.

15. As of June 30, 1974, Shell had 196 stations operated by independent lessee dealers in Maryland. Shell currently has 7 branded jobbers in Maryland.

16. The following table shows the number of company-operated and direct-served dealer operated facilities in the State of Maryland selling Shell branded products for the years 1971 through the first six months of 1974:

	PERIOD AS OF			
	12/31/71	12/31/72	12/31/73	6/30/74
Company Operated	0	0	1	1
Dealer Operated*	203	206	206	196

*This includes dealer facilities which are either leased from Shell or another or owned by the dealer.

17. The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in 1973:

TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED	% OF TOTAL
148,266,866	1,477,639	1%	146,789,227	99%

18. The following table shows the volume of gasoline in thousands of gallons sold through Shell branded direct-served facilities in the State of Maryland in the first six months of 1974:

TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED	% OF TOTAL
68,558,649	793,104	1.2%	67,765,545	98.8%

19. The following table shows the volume of tires and batteries sold through Shell branded direct-served facilities in the State of Maryland in 1973:

	TOTAL	COMPANY OPERATED	% OF TOTAL	NON-COMPANY OPERATED*	% OF TOTAL
Tires (units)	29,279	155	0.5%	29,125	99.5%
Batteries (units)	10,329	25	0.2%	10,304	99.8%

*These figures reflect only wholesale sales by Shell to non-company operated stations. The dealers at these stations may purchase additional quantities of these products from other sources and sell them at retail.

20. In 1973 Shell's company-operated station had retail sales of $11,044 in house brand tires, batteries and accessories. This is 0.6% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

21. In the first six months of 1974, Shell's company-operated station had retail sales of $7,968 in

house brand tires, batteries and accessories. This is 0.7% of the wholesale sales by Shell of house brand tires, batteries and accessories to non-company operated stations.

22. The hours of operation at Shell's company-operated station have been as follows:

DATE	HOURS OF OPERATION
3/1/73-12/15/73	24
12/15/73-1/15/74	18 (6 a.m. - 12 p.m.)
1/15/74-5/1/74	12 (6 a.m. - 6 p.m.) (closed Sundays)
5/1/74-	15 (6 a.m. - 9 p.m.) (open Sundays)

23. Though Shell has only one company-operated station in Maryland, the following is a list and explanation of innovative marketing concepts and products tested nationally at Shell company-operated stations:

Full self-service – This type of retail outlet allows the consumer to perform all required services, including the dispensing of automotive gasoline.

Gasoline only – In this type of outlet, the consumer is offered, by an attendant, only gasoline and other pump island services.

Tunnel car wash – This denotes an outlet that offers specialized equipment for washing an automobile. Although such equipment may be found in both dealer and company operated stations, it will generally not be found at dealer operated stations due to the large capital investment required.

Self-repair – This type of outlet, which is currently being evaluated by Shell, offers the consumer, in addition to gasoline, all the necessary tools and facilities to repair his own automobile. The customer rents a service bay at a per hour cost and he has use of all tools and instruction manuals. There is also a technician on duty.

Mini-mart – This type of outlet, which is currently being evaluated by Shell, would offer the consumer, in addition to some or all of the traditional services and products, various non-petroleum related products to satisfy his needs.

Motor lab – This type of outlet was based on the viability of certain diagnostic and repair equipment. After thorough testing and evaluation, it was determined that such equipment did not meet marketing needs and standards.

Express oil changer – Through an Express vacuum stick which removes used automobile oil, the express oil changer allows the customer to perform an inexpensive, clean and fast oil change.

Computerized gasoline pump – This allows a customer to fulfill gasoline, motor oil and car wash and wax needs at all times and without delay. The pump accepts either cash or credit card for the products and services selected.

Pilfer – proof oil merchandiser – This is a display stand with the capacity to hold 48 quarts of motor oil. Due to its locking mechanism, it dispenses with the necessity of securing the merchandise when the station closes and thus allows for continuous display of the product. It also contains a protected area for a credit card imprinter and a light weight oil can disposal unit.

Autosense – This computer oriented device identifies all automobile repair needs. It improves productivity by

releasing mechanics for repairs and eliminates the possibility of human error.

Shell gasoline and motor oil is constantly being tested and evaluated.

24. Shell recognizes certain geographic areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such "trading areas" it has, in order to meet the equally low price of a competitor of Shell, temporarily reduced its wholesale price or granted temporary allowances to its dealers or jobbers without making a general price reduction or allowance throughout the State.

25. The normal business practice of Shell is not to extend temporary allowances, price adjustments or rent relief "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide.

26. Shell has on occasion granted to its lessee dealers in Maryland rental abatements or rental modifications.

27. When Shell leases a service station facility to a dealer, the Shell owned equipment at the station is included in the lease agreement.

28. From January 1974 to September 1, 1975, the sale of gasoline in Maryland and in the United States was regulated by the federal government pursuant to the Emergency Petroleum Allocation Act of 1973 and the regulations issued thereunder.

Counsel for Defendants

Counsel for Plaintiff
SHELL OIL COMPANY

APPENDIX D
Stipulated Facts Concerning Gulf Oil Corporation

1. Deleted.

2. Gulf Oil Corporation ("Gulf"), a Pennsylvania corporation, is involved in exploration for and production of crude oil and natural gas and in refining, transporting and marketing, at both the wholesale and retail levels, of a wide range of petroleum products. Gulf branded gasoline is sold at approximately 18,430 retail outlets throughout the United States. Gulf also has interests in coal, atomic energy and other resources which could become energy producing in the future.

3. Gulf has done business in Maryland for more than 40 years, and is the third leading supplier of gasoline in Maryland, selling to dealers, wholesalers, the public and others approximately 9% of all the gasoline sold in Maryland. All of the gasoline sold by Gulf in Maryland is transported into the state from refineries located beyond the borders of the state.

4. In 1936 Gulf opened its first modern service stations in the Baltimore area. Prior to that time, Gulf had some bulk plants in Maryland and operated on a limited basis at the wholesale and retail levels in the state.

5. Insofar as petroleum products are concerned, operations by Gulf in Maryland are limited to storage, distribution and marketing.

6. Gulf is not engaged in the producing of motor vehicle fuels in the State of Maryland.

7. In rare instances, upon notification from the State of Maryland that Gulf's product is not in compliance with state required specifications, Gulf mixes different grades or types of gasoline in order to bring the product into compliance. For example, Gulf may add premium gasoline to regular grade gasoline with too low an octane rating. The product would then be sold as regular gasoline. Also, if the lead content of a small volume of low-leaded gasoline is too high, it may be added to a large volume of low-leaded gasoline, so that the lead content of the resulting product is within specifications.

8. Deleted.

9. Since Gulf has no crude oil production or petroleum refineries in Maryland, purchasers of Gulf branded gasoline in Maryland have all of their gasoline supplied from and refined out of state. Gulf refined products reach the Maryland market as follows:

a. Gasoline from Port Arthur, Texas, and Alliance, Louisiana, enters the State of Maryland via the Colonial Pipeline. Gasoline from Philadelphia, Pennsylvania, enters the State of Maryland either by barge or truck.

b. Three Gulf terminals serve customers in Maryland. These are located at Baltimore and Salisbury, Maryland, and Fairfax, Virginia. The Baltimore and Fairfax terminals are supplied by the Colonial Pipeline. The Salisbury terminal is supplied via barge from Philadelphia. Customers in Maryland are also served by bulk plants in various parts of Maryland and one bulk plant in Delta, Pennsylvania. Some of these bulk plants are supplied by truck from the various terminals; others are supplied directly by barge from Philadelphia.

c. All motor oils sold in Maryland originate from the Philadelphia refinery, and are shipped by truck to terminals and bulk plants in Maryland, Fairfax, Virginia and Delta, Pennsylvania.

d. All greases are packaged by the Port Arthur refinery and shipped via tanker to Philadelphia, and thereafter by truck to terminals and bulk plants.

10. In 1974, 87,768,000 gallons of gasoline were sold by Gulf service stations in Maryland; in 1973, 82,983,000 gallons of gasoline were sold by Gulf service stations in Maryland.

11. Gasoline from out-of-state refineries is transported to Gulf's terminals in Baltimore and Salisbury and to bulk plants in various parts of Maryland from which retail gasoline outlets in Maryland and elsewhere are supplied. Some Maryland retail outlets are supplied from out-of-state terminals or bulk plants. Based upon August 1975 crude runs, which are typical, all of the Gulf gasoline sold in Maryland is refined at either Gulf's Port Arthur, Texas, refinery, its Alliance, Louisiana, refinery or its Philadelphia, Pennsylvania, refinery. More than half of the crude oil processed at Gulf's Alliance and Port Arthur refineries is of domestic origin, with the balance imported from Nigeria or from Cabinda, West Africa. All of the crude processed at Gulf's Philadelphia refinery is imported from Venezuela, Nigeria and Cabinda, West Africa.

12. Tires, batteries and accessories sold at Gulf retail outlets, both company-operated and dealer operated, are manufactured by companies other than Gulf in various places outside of the State of Maryland and shipped into Maryland in interstate commerce.

13. The consumer in Maryland is served by various kinds of Gulf retail gasoline outlets. These include 1 major service center, 2 drive through car wash facilities, 8 stations having in bay car wash facilities, 101 merchandisable service stations (i.e. full service), 3 full and 12 partial self service stations. The balance of the Gulf retail outlets in Maryland consists of country grocery stores (Ma and Pa) with gasoline pumps, small garages and other diversified businesses with gasoline pumps, these being the facilities that, in Gulf's opinion, fill the needs of the communities in which they are located.

14. In Gulf's opinion Gulf can best serve consumers and itself by using different types of retail gasoline outlets and marketing methods, and Gulf has in fact, where possible, varied its marketing methods in response to market conditions.

15. Since approximately 1952 Gulf has marketed its gasoline primarily through independent retailers and wholesalers rather than through company operations.

16. As of September, 1975, there are approximately 218 independent dealer stations in Maryland buying Gulf gasoline directly from Gulf, of which approximately 109 leased stations from Gulf and 109 own their own stations or lease them from parties other than Gulf. There is one company-operated Gulf station in Maryland. If it is permitted to continue to own and operate retail service stations in Maryland, Gulf anticipates owning and operating approximately 22 retail gasoline outlets within the next five years.[1] Gulf

[1] Nineteen of the 22 are presently operated by lessee dealers; two are temporarily closed and under reconstruction; and one is already company owned and operated. As to the 19 lessee dealers, Gulf's policy and intention are to attempt to negotiate a buyout of their operations. Any lessee dealers who decline to sell may remain in business as usual.

has refrained from commencing ownership and operation of these stations[2] pending this litigation.

17. Gulf's experience with company-operated service stations shows that under certain circumstances, company operation is a more efficient mode of direct marketing of gasoline by Gulf. Through direct company operations, Gulf can control hours of operation and service and may respond quickly to price changes in the market. In Gulf's opinion, direct company operations can result in significantly lower selling costs per gallon of gasoline than a traditional dealer operated station. These reductions in selling costs might be passed on to the consumer in the form of lower gasoline prices.

18. The ability to market through company-operated stations allows Gulf to experiment with innovative, competitive marketing techniques. Such outlets represent an alternative marketing technique, rather than an exclusive mode of marketing. However, in certain circumstances, company-operated stations represent the most desirable and efficient retail technique, from the standpoint of Gulf.

19. From Gulf's viewpoint, other possible advantages of company-operated stations are:

a. High standards of service and cleanliness
b. High standards of design; generally attractive appearance
c. Longer hours of operation to serve the public
d. Fast "no frills" sales, for that portion of the public which desires them.

[2] (except for one station owned and operated since prior to the commencement of this litigation)

20. Company-operated stations can be used for testing new market techniques. For example, Gulf first tested its "Tire Hut" discount auto, home and garden outlets at company-operated stations outside of Maryland.

21. In Gulf's opinion Gulf company-operated stations are able to quickly and effectively respond to changing market conditions. During times of shortage, Gulf's control over its company-operated stations would permit Gulf to coordinate hours of operation in order to attempt to lessen the hardship on motorists.

22. Deleted.

23. In Gulf's opinion the divorcement of Gulf's company-operated station will diminish its value. Furthermore, the provisions of the Maryland Act which prohibit Gulf from operating retail service stations in Maryland will prec'ude the conversion of any Gulf properties in Maryland to company owned and operated service stations.

24. Gulf's investment in its existing company-operated station in Maryland is as follows:

Land	$ 78,510.00
Building	53,424.00
Equipment	33,977.00
TOTAL	$165,911.00

25. The granting of price differentials and allowances has been a normal business practice of Gulf.

26. Gulf stations in Maryland serve a market composed of consumers operating both in interstate and intrastate commerce. A sampling of consumers in interstate commerce includes: truckers – Chemical Leaman, Carolina Freight, Eastern Express, Johnson

Motor Lines and O'Boyle Tank Lines; railroads – The Chessie System, Penn Central Railroad and Southern Railway System; airlines – Eastern, BOAC, Braniff, TWA, Northwest Orient and National. Maryland borders several jurisdictions – Delaware, Pennsylvania, West Virginia and the District of Columbia. Maryland falls within the Washington-New York-Boston Corridor and lies between the major metropolitan areas of Washington, D.C. and Wilmington-Philadelphia.

27. Gulf recognizes certain competitive trading areas in Maryland and surrounding states wherein it identifies competitive markets for the sale of its products. Within such trading areas it has, in order to meet competition from other suppliers, granted temporary competitive allowances to its dealers or resellers without granting such allowances throughout the state.

28. Some of Gulf's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including the District of Columbia, Virginia, Delaware, Pennsylvania and West Virginia.

29. The normal business practice of Gulf has never included any program whereby it extended temporary competitive allowances "uniformly to all retail service station dealers supplied" either within the State of Maryland or nationwide. Gulf is not aware of any violations of law by Gulf in the use of any such allowances in the State of Maryland.

30. When Gulf leases a service station facility to a dealer, such Gulf owned equipment as pumps, tanks, lifts, lights and air compressors are included in the lease agreement and the lease rental. Other items of Gulf owned equipment, such as identification signs and

credit card imprinters, are separately rented to the dealer. Gulf does not apportion the rental for a fully equipped service station between the equipment included in the lease and the real estate.

31. Gulf has on occasion granted to its lessee dealers in Maryland rental abatements or modifications for various reasons.

32. Deleted.

/s/ Lawrence S. Greenwald,
Attorney
for Gulf Oil Corporation,
Plaintiff

/s/ John A. Woodstock, Attorney
for
Defendants

APPENDIX E

Statement of Facts Particular to Phillips Petroleum Company

1. Phillips Petroleum Company ("Phillips") is an integrated petroleum company based in Bartlesville, Oklahoma.

2. Phillips is engaged in production, refining, processing and marketing of petroleum products of all varieties and various derivatives of petroleum. It has six domestic crude oil refineries, all of which are located west of the Mississippi River, two in Texas, one in Kansas, one in Utah, one in Montana and one in California. A subsidiary, Puerto Rico Core, Inc., owns and operates a petrochemical manufacturing plant in Puerto Rico that uses chemical feedstocks but produces some gasoline as a by-product.

3. The crude oil production of Phillips is mainly in the Mid-Continent region of the United States. There is, of course, some production from foreign sources.

4. Phillips engages in no crude oil production and has no petroleum refineries within the State of Maryland. All Phillips branded refined petroleum products available at Phillips branded stations in Maryland are supplied from outside the State. Insofar as Phillips' operations in Maryland related to refined petroleum products are concerned, Phillips is only a supplier and a marketer. Phillips does lease segregated bulk storage tanks for refined products at the Amerada-Hess terminal in Baltimore.

5. Phillips was incorporated in the State of Delaware in 1917. At one time it marketed in all of the 50 states

and at present it markets to some extent in all of the states except Alaska and Connecticut.

6. For purposes of marketing, the company operations are divided into three geographic regions, a Western Region, a Central Region and an Eastern Region, as shown on the map (which is attached hereto as Exhibit A.) The State of Maryland is within the Eastern Region. In marketing petroleum products, Phillips is a wholesale supplier of gasoline, distillates, motor oils and greases to jobbers, dealers and ultimate consumers.

7. Phillips also is a wholesale supplier of tires, batteries, accessories and sundry items of merchandise. Phillips also is a retailer of the same products and also service work in Phillips branded, salary operated service stations. In some situations, Phillips sells all of these items except service work, and in some instances, except tires, batteries and accessories, in secondary or private branded stations.

8. During the period January 1, 1969 to date, substantially all of the automotive gasoline marketed by Phillips, other than through its own salaried service stations, was marketed by selling to independent businessmen or companies that are not employees or agents of Phillips. Phillips has been basically a jobber oriented company, by which is meant that it historically has sold its branded products to wholesale distributors (jobbers) for resale through their own service stations or to independent dealers operating service stations. Phillips does sell some of its refined petroleum products directly to some of the independent dealers.

9. Jobbers are independent businessmen or companies who purchase petroleum products direct from Phillips and either market them through their own facilities or resell to their wholesale consumers or their dealers for further resale to retail consumers. Nationwide through the years 75% to 80% of Phillips products has been sold to jobbers. Today about 67% of all gasoline which Phillips sells in Maryland is sold to jobbers. Approximately 17% is sold direct to the public through Phillips salaried service stations, and about 16% is sold directly to independent dealers who also are usually independent businessmen who employ one or more people either on a part-time or full-time basis to operate a one or a multi-bay service station offering a line of gasoline and other petroleum products and allied services and items within their discretion.[1] Some of these dealers own their service stations but most lease their service stations either from Phillips or from Phillips jobbers or third parties.

10. Nationwide during the 1969-1973 period the ratio of salary operated service stations to the total

---

1

	1973		1974	
	% of Business	Gallons	% of Business	Gallons
Salaried Operations	20.16	7,364,690	17.2	5,077,551
Direct Dealers	17.34	6,335,444	15.89	5,520,253
Jobbers	62.50	22,837,487	66.91	23,245,570
Total	100.00	36,537,621	100.00	34,743,334

In 1974 Phillips salaried service stations and direct dealers (i.e., independent dealers buying refined petroleum products directly from Phillips) shared a smaller percentage of the refined petroleum products sold directly to the public than in 1973; correspondingly, the percentage of sale by jobbers increased.

number of retail outlets for Phillips products varied from a high of about 5.4% to a low of 1.6% during such period. In Maryland, for this same period, the ratio of salary operated service stations to the total number of retail outlets[2] varied from a high of 14.05 percent to a low of 7.88 percent. Attached hereto as Exhibit B is a statement of the approximate number of outlets for Phillips products operated during 1974 within the various geographic regions and the percentage thereof that were salary operated by Phillips.

11. In Maryland at present, there are approximately 121 retail outlets for Phillips products, of which 13 are salary operated units. Nationwide there were on November 25, 1974 approximately 17,000 total retail outlets for Phillips products, of which number exactly 1,043 were salary operated units. A precise total as to the number of salary operated units can be given because these are a matter of company record and are under Phillips' immediate control. Phillips cannot at any time be absolutely certain as to the total number of outlets throughout the country or within any individual state because it does not control the entrance into business or the exit from business of dealers who sell petroleum products under the Phillips signs but who have their contracts with jobbers and not withPhillips, nor can it control the number of jobber operated stations. Phillips leases to jobbers a quantity of Phillips signs and credit card imprinters and the jobbers utilize these within their sole discretion in putting new dealers in business. Jobbers can acquire new dealers or open stations with their own employees at any time without any prior notice to Phillips or without any control by

[2]The number of the total retail outlets for Phillips products is an approximate figure, both for Maryland and nationally. For the reasons for the unavailability of accurate figures, see Paragraph 11.

Phillips over such acquisition or any later termination of the dealers. It would take a day-to-day count of these locations as actually in place and operating for Phillips to be able to ascertain with even approximate accuracy the number of outlets selling Phillips products on any specific day.

12. Of the 1,043 company operated outlets, which includes 13 Maryland outlets, some sell Phillips' principal brands only and others sell secondary brands only. The ratio between these categories varies almost daily. Nationally, from 1969 to 1973 Phillips' distribution of branded product by sale to wholesale distributors for resale decreased from 54.2 percent to 48.2 percent, while unbranded sales to wholesale distributors increased from 16.5 percent to 24.8 percent. To the contrary, in Maryland during the same period of time branded sales increased from 55.7 percent to 62.5 percent, but there has never been any unbranded sales by Phillips to wholesale distributors in Maryland.

13. Although Phillips Petroleum Company is a large producer and refiner of petroleum products, it does not produce or refine in Maryland. Phillips first began operating in Maryland as a marketer of petroleum products in 1960. It presently is qualified to do business in the State of Maryland and has been so qualified since 1960. Phillips markets its refined petroleum products in Maryland under the principal Phillips brands, such as Phillips 66 Regular, Phillips 66 Premium, and Phillips 66 Unleaded and also under its secondary or private brands such as Way-Lo Regular, Way-Lo Premium, and Way-Lo Unleaded. These trade names or brands are registered federally and also in Maryland.

14. A good portion of the service stations operated by jobbers or by jobbers' dealers are either owned in fee by the jobbers or leased by them from Phillips or from third parties. Phillips exercises no control over the day-to-day operations of the independent dealers whom it supplies directly or over the independent jobbers. Where real estate leases are in effect there are, of course, some limitations and some requirements related to use of the premises. In all instances, there is some control exercised as necessary to protect quality of products, to avoid adulteration of products and to protect brands. The setting of retail prices at stations operated by jobbers, direct dealers or jobber-dealers is at the sole prerogative of the jobber, direct dealer or jobber-dealer.

15. Phillips does not market any refined petroleum products within Maryland that are produced or refined in the State. All of Phillips' petroleum products move into Maryland in interstate commerce from refineries located outside of Maryland. The tires, batteries and accessories sold in Phillips' salary-operated service stations in Maryland also come into such state in interstate commerce.

16. At present, of the approximate total of 121 marketing outlets in Maryland for the retail sale of Phillips' brands of gasoline and other petroleum products, approximately 108 are service stations operated by persons or companies who are not Phillips' company personnel, subsidiaries, or commissioned agents, but who buy gasoline and other petroleum products from Phillips for wholesale or retail sale. 88 of these stations are operated by jobbers or by dealers of jobbers, and the remaining 20 are operated by dealers supplied directly by Phillips. The other 13 service stations within Maryland are operated by salaried

personnel of Phillips, with 10 selling only Phillips' principal brands and 3 selling only Phillips' secondary Way-Lo brands.

17. At the present time Phillips owns in fee only 5 service station properties in the State of Maryland. All 5 are leased directly to dealers. Phillips presently leases from others 44 service stations in Maryland of which it subleases 17 to jobbers and 9 to direct dealers, operating 13 with its company employees. Five of these leased stations are presently vacant or are being rented by third parties for other purposes than retail marketing of Phillips' products. The following is a resume of Phillips' investment in marketing properties in Maryland.

Phillips service station investment	$1,348,853.88
Phillips loaned equipment investment[3]	150,201.20
Phillips TBA lube warehouse investment[4]	19,641.72
Total	$1,518,696.80

The above are net figures as of a time within the last six (6) months as to each property, after deducting depreciation; initial investments were greater.

18. Attached hereto as Exhibit C[5] is a list of the thirteen (13) Phillips service stations operated in Maryland by Phillips personnel. The list includes the company station number, the type of operation and approximate net investment of Phillips. The "Private Brand Express" label identifies the three secondary brand, Way-Lo, stations which are not full service

[3]Phillips loaned equipment investment consists of equipment, such as car-lifts and storage tanks, loaned to consumer accounts.

[4]Phillips TBA lube warehouse investment represents warehouse facilities only.

[5]The total net investment reflected in Exhibit C is a part of, and included in, the total investment figure of $1,518,696.00 reflected in Paragraph 17.

stations. The "Vanguard" label identifies the other ten which are operated as Phillips branded units. Seven (7) of the stations are leased under long term lease by Phillips from outside parties who own or lease the land and own the improvements. Phillips' net investment as to these is usually minimal because it normally involves only equipment. One station is located on leased land and is improved with service station improvements owned by Phillips. The remaining five (5) stations are leased by Phillips from a lessor with whom there is an agreement that Phillips must hold such party harmless from any loss on the investments. There is an additional $527,239.37 invested in these properties by such lessor. In all instances the investment figure is after deduction of depreciation.

EXHIBIT A

EXHIBIT A TWO

EXHIBIT B

	Phillips Co. Numbered S.S.						Other S.S.		Total
	Owned in fee			Leased					
	Dir. Dir.	Jobber	Total	Dir. Dir.	Jobber	Total	Dir. Dir.	Jobber	Total	
(EASTERN REGION)									
	170	155	325	720	1,325	2,045	355	5,690	6,045	8,415
(CENTRAL REGION)									
	108	196	304	557	1,472	2,029	167	3,714	3,881	6,214
(WESTERN REGION)									
	279	33	312	739	130	869	893	287	1,180	2,361
(TOTALS)									
	557	384	941	2,016	2,927	4,943	1,415	9,691	11,106	16,990

	Total Units	Phillips Operated	%Phillips Operated
EASTERN REGION:	8,415	284	3.27%
CENTRAL REGION:	6,214	309	4.97%
WESTERN REGION:	2,361	450	19.06%
TOTALS	16,990	1,043	6.14%

Summary by area:

EASTERN REGION:

Southeast Area (Alabama, Florida, Georgia, Mississippi, Southwest tip of North Carolina, small part on the Southwest side of South Carolina, Tennessee)

Total Units	Salaried Units	Percent
2,338	95	4.06%

Atlantic Coast Area (District of Columbia, Maryland, New Jersey, balance of North Carolina, Ohio, Pennsylvania, balance of South Carolina, Virginia, West Virginia)

Total Units	Salaried Units	Percent
2,966	123	4.15%

Midwest Area (Illinois, Indiana, Eastern one-fourth Iowa, Kentucky, Michigan, Eastern one-third Missouri, Eastern two-thirds Wisconsin)

Total Units	Salaried Units	Percent
?,111	66	2.12%

CENTRAL REGION:

Central Plains Area(Small piece Northwest Arkansas, Eastern two-thirds Kansas, Western two-thirds Missouri, Okalhoma except the Panhandle)

Total Units	Salaried Units	Percent
1,545	79	5.11%

Gulf Coast Area (Balance of Arkansas, Louisiana, Oklahoma Panhandle, Texas except El Paso)

Total Units	Salaried Units	Percent
2.061	72	3.49%

Rocky Mountain Area (Colorado, El Paso, Texas, Western one-third Kansas, Northwestern Minnesota, Montana, Western two-thirds Nebraska, New Mexico, North Dakota except Southeast corner, South Dakota except Southeast corner, part of Wyoming)

Total Units	Salaried Units	Percent
1,135	60	5.29%

Northern Plains Area (Western three-fourths Iowa, balance of Minnesota, Eastern one-third Nebraska, Western one-third Wisconsin)

Total Units	Salaried Units	Percent
1,473	98	6.65%

WESTERN REGION: (Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, balance of Wyoming)

Total Units	Salaried Units	Percent
2,361	450	19.06%

EXHIBIT C

SERVICE STATIONS IN MARYLAND

OPERATED WITH PHILLIPS PERSONNEL

NUMBER	LOCATION	TYPE	APPROXIMATE NET INVESTMENT
17003	Millersville, Md.	Private Brand Express	$ 12,265.01
17232	Edgewater, Md.	Vanguard	11,157.35
17803	Baltimore, Md.	Private Brand Express	12,386.83
17879	Bladensburg, Md.	"	9,283.50
18650	Lutherville, Md.	Vanguard	8,076.23
19071	Abingdon, Md.	"	13,859.20
19086	Millersville, Md.	"	7,492.64
20067	Baltimore, Md.	"	3,378.08
20211	Wheaton, Md.	"	11,923.41
20259	Baltimore, Md.	"	41,933.60
24022	Cockeysville, Md.	"	6,117.11
24603	Baltimore, Md.	"	23,366.74
25442	Baltimore, Md.	"	3,643.19
		TOTAL	$164,882.89

AFFIDAVIT

State of Georgia, County of Dekalb

R. A. Kurland, of lawful age, being by me first duly sworn according to law, deposes and says:

1. I am the General Sales Manager, Eastern Region, Marketing Division of Phillips Petroleum Company in Atlanta, Georgia. My home address is 3122 Belingham Drive, Northeast, Atlanta, Georgia 30345. My business address is 2220 Park Lake Drive, Northeast, P.O. Box 4833, Atlanta, Georgia 30302.

2. I have been continuously employed by Phillips Petroleum Company since September 9, 1946 on which day I came to work as a trainee in the Marketing Department. I had just completed work toward my Bachelor of Science degree at Oklahoma State University, Stillwater, Oklahoma. The various positions I have held with the company since my initial employment include: Warehouse employee; Personnel Clerk, Chemical Department; Marketing Department work in developing the anhydrous ammonia fertilizer distribution system; Assistant Division Manager, Fertilizer Sales, Denver, Colorado; Vice President and General Manager of Curry Chemical Company, a subsidiary of Phillips; Assistant Division Manager, Petroleum Products, Denver, Colorado; Senior Assistant Division Manager, Wichita, Kansas; Division Manager, Wichita and Memphis, Tennessee; Director of Marketing Research, Bartlesville, Oklahoma, Regional Manager, Southeastern Region; President, Phillips Films Company, a Phillips subsidiary; and General Sales Manager, Eastern Region Office,

Atlanta. I have held this last position since 1970. While with the company I have done graduate level work in the Stanford University Executive Program in the Graduate School of Business.

3. As General Sales Manager of the Eastern Region I am responsible to the Vice President of Marketing of Phillips for all marketing of refined petroleum products in the states which comprise the Eastern Region. These states are 19 in number and include all or parts of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. Also included is the District of Columbia. In all of the states of the Eastern Region Phillips is a wholesale supplier of gasolines, distillates, motor oils, greases, tires, batteries and accessories to its jobbers, its direct dealers and to some wholesale consumers. In most of these states Phillips also is a retailer of these same items by selling through its salary-operated stations. Maryland is within the Eastern Region and Phillips is both a wholesaler and a retailer in the State of Mayland.

4. Phillips markets its refined products in Maryland under its principal Phillips brands and also under a secondary brand known as Way-Lo. The trade names and brands of both Phillips and Way-Lo are appropriately registered in the State of Maryland.

5. During the entire period of my tenure as Eastern Region General Sales Manager Phillips has marketed in Maryland primarily by selling to jobbers or direct dealers, but it has operated a few of its service stations with its company employees. The great majority of our products is sold to jobbers with over 75 percent of our gasoline normally being sold to such jobbers nation-

wide, and 67 percent in Mayland. These jobbers within their sole discretion operate their stations with their own employees or contract with other independent businessmen to be dealers of Phillips refined products. Phillips has no control over the time or the manner in which any of these stations are placed in business or terminated from business. Phillips will not know from day to day how many of such jobber or jobber-dealer stations may be operating without taking a de facto count. In the day-to-day operations of the jobber-dealers, dealers to which Phillips sells direct, and jobbers, Phillips exercises no control. There are, of course, some provisions for control of quality of product and over use of Phillips-owned or Phillips-leased properties, but that is the extent of our control. We do try to offer suggestions for improvement of operations.

6. At the present time, Phillips markets its products in three regions, Eastern, Central and Western. At the end of 1974 the percentage of Phillips' salary operated stations in the Eastern Region was 3.27 percent, in the Central Region 4.97 percent and in the Western Region 19.06 percent for a national average of 6.14 percent. This percentage is expected to decrease appreciably in the immediate future when the presently pending sale of Phillips' marketing facilities in a large portion of its Western Region to The Oil Shale Corporation is finalized. The percentage of salaried operations in the Western Region has always been higher than in the balance of the country. This is due in part to the fact that Phillips is relatively new in marketing in a good portion of the Western Region, having come into that area as recently as 1966 by purchasing the marketing outlets of Tidewater Oil Company. Shortly after such acquisition, there were a large number of closings of

service stations due to the determination that they were unprofitable and due to the business decision by Phillips to upgrade the total marketing program in that area. In addition, the Western Region market is not a jobber oriented market, and Phillips has not been in the market place on the West Coast for an adequate length of time to be able to attract good dealers or jobbers in any large quantity. Consequently, Phillips made the business decision that a large number of the stations had to be operated by company employees in order for Phillips to be competitive in the market place. Phillips is of the opinion that this is a good example of why flexibility in marketing is necessary, to remain competitive and be responsive to the needs and demands of customers. In the State of Ohio, which is in the Eastern Region, 43 percent of Phillips total outlets are salary-operated stations. Again, Phillips was of the opinion that this was necessary in order to remain competitive with other marketers of petroleum products in that area.

7. Nationwide there were at the end of 1974 approximately 17,000 total retail outlets for Phillips products, of which number exactly 1,043 were salary-operated units, most selling Phillips principal brands only but a few selling secondary brands only. The ratio between these categories varies almost daily. These variances in methods of operation reflect Phillips efforts to maintain flexibility and meet the demands of the market. During recent years Phillips sales of branded products to jobbers have decreased and unbranded sales to jobbers have increased substantially.

9. As of June 30, 1975, there were 121 total retail outlets for Phillips brand products in the State of Maryland. Of these 3 sell Phillips' secondary brand,

Way-Lo, and these are not what would be called in the industry full-service stations. They provide no automotive service in the form of maintenance or repair. They sell only gasoline and add-on oil, and occasionally some minor accessory items which require no mechanical work and only limited, if any, installation work. The remaining 118 stations sell Phillips' principal brands. Phillips salary-operated principal brand stations are called "Vanguard" stations and provide all types of automotive service to their retail customers as well as having for sale a complete line of company petroleum products and tires, batteries, and accessories. Salaried personnel work in shifts, with varying hours of operation and under rather stringent controls by our company. These stations are intended as Phillips' "show places". Phillips endeavors to operate them in exemplary manner and provide the best service possible. They constitute part of Phillips' training program for its Marketing division. There are three detailed programs which are presented to all of Phillips' new service station employees. All of these stations are used to give on-the-job training. In addition, the Marketing trainees who are destined for jobs other than as service station attendants or managers undergo training at these stations. In addition to providing a ready source for Assistant Managers and Managers of the service stations, they also provide a source for potential Marketing division trainees and independent dealers. Moreover, Phillips' jobbers and occasionally its dealers will hire some of these driveway salesmen from Phillips for use in their businesses. We have found and are of the opinion that the personnel manning these stations receive excellent training to equip them to better serve the public. They are required to follow standard operating instructions and operating guidelines with

regard to day-to-day procedures involving all phases of the stations' operations, including customer service procedures, cleanliness standards, personal appearance and uniform standards, use of advertising displays, etc. Phillips cannot, of course, exercise such control over the day-to-day routine operations of its direct dealers, jobbers or jobber-dealers. Total volumes of motor fuel sales from these salary-operated stations in Maryland were 7,364,690 gallons for 1973 and 5,977,551 gallons for 1974. Of the 118 branded stations in Maryland 88 are jobber controlled, 14 are leased direct from Phillips to dealers, 6 are owned by dealers or leased by them from others, and 10 are Vanguard stations operated with Phillips employees. Most of Phillips' employees in Maryland are involved in operation of the salary-operated stations.

9. Only Phillips-produced and refined products are sold through the Phillips operated stations. Phillips branded products sold in Maryland are produced and refined outside the state and are brought to the state in interstate commerce, principally by pipeline for delivery into Phillips' segregated storage at the Amerada-Hess terminal at Baltimore. Some small amount comes by transport trucks from another state.

10. Operation by Phillips of a total of 13 service stations in Maryland with company personnel results in a percentage of such operation being approximately 10.7 percent of the total number of retail outlets for Phillips branded products in Maryland. This is at best an estimate of the percentage because of Phillips being unable to control the exact number of total outlets selling Phillips brand products at any given time, since jobbers may open additional stations selling Phillips branded products within their sole discretion and often

times without prior notice to Phillips. A comparison of percentages of such company operations in the 19 states which are within the Eastern Region of Marketing of Phillips reveals that such percentages range from zero in 5 states to a maximum of 43.3 percent in Ohio. These percentages in various states necessarily increase or decrease as Phillips concludes salary or, alternatively, dealer operations are best suited to remain competitive in the market place. Phillips marketing concept is based on the opinion that it must maintain a number of full-service service stations in any state in order to provide automotive services to the public other than sales of gasoline and oil.

11. There is no general trend or any present plans on the part of Phillips in Maryland for conversion of dealer units to company-operated units. Sometimes it is necessary that stations previously operated by Phillips' dealers be operated with salaried personnel if the station is to remain open when the dealer ceases to operate the station at a particular location with little or no notice. Examples of such situations include: termination of the lease by the dealer or Phillips; death; prolonged serious illness; bankruptcy; fraud and so forth. Also it often is essential that new service stations be operated with salaried personnel until the station builds up its trade to the point where its business will attract a good dealer and can result in his operation of the station at a profit to him. Of course, units previously operated by salaried personnel also are on occasion converted to jobber operations or direct dealer operations. In our opinion, the demands of the market place cause variances in the operation of these stations. Overall in Maryland from 1971 to the present time there has been a decrease in the number of service

stations operated by Phillips employees from a high of 26 in 1971 to the present total of 13 which has been consistent since 1973.

12. In our opinion, the effect of the enforcement of the Maryland statute would be to cause Phillips to have to decide which, if any, of the presently company-operated stations it would want to convert to jobber or direct dealer operation. Such decision making process could very well result in the closing of some of the stations by Phillips. Whether closed or converted to jobber or direct dealer units, a necessary result could be the termination of employment of some of the present service station managers and employees. Upon a conversion to jobber or dealer operation, the new operator might want to hire some of these employees. It is quite possible that the present Phillips employee-operators would not be able to become direct dealers in these stations because the necessary investment might very well be prohibitive. It is, of course, possible that all of the Phillips-operated stations could be converted to jobber or dealer units, but in our opinion it is highly probable that such might not be feasible, either because of inability to find persons with the capital necessary to invest in such an operation or because dealer operations would be too expensive, necessitating such increases in consumer prices in order to be profitable operations that the stations could not be competitive.

13. I believe that it is impossible to predict with certainty what enforcement of the statute would result in ultimately insofar as Phillips' overall operations in Maryland are concerned. Clearly the existence of the statute would cause Phillips to be extremely wary of further investments in marketing facilities in Maryland. In my opinion, further expansion would be virtually

precluded and substantial improvements to existing facilities might very well not be made. I believe the same effect, only to a lesser extent, might result to Phillips' jobbers. Furthermore, it is my opinion that the statute would virtually eliminate Phillips from the list of prospective purchasers of jobbers' businesses when any such jobbers decided to sell. I am also of the opinion that the immediate impact of the statute to the producers and the refiners would be to create an unhealthy marketing climate for retail of refined petroleum products in Maryland. This unhealthy climate would ultimately lead to consideration of whether a company would cut back its operations or even continue to market in the state. It is highly unlikely that Phillips would withdraw from marketing petroleum products in Maryland, but my responsibility as General Sales Manager of the Eastern Region would necessitate my reviewing this matter and making my recommendations to our Company management.

14. Based upon my experience and knowledge of retail marketing of refined petroleum products, it is my opinion that the ultimate effects of this statute upon consumers in Maryland would generally be bad. I believe it would result in deterioration of service available to the consumer; possible increases in prices to consumers; a stagnation of competition; an interruption of business continuity necessary for good service to the customer; termination of use of Company-operated stations for the training and better equipping of service station operators, both Company and independent dealer, and for introduction and perfection of innovations relating to service, merchandising, new equipment, and so forth. It is also my opinion that it could lead to diversion of product from the State of Maryland either with or without a Federal allocation program.

15. Although I believe this legislation was apparently designed to protect independent dealers it is my opinion that it will not result in such protection. It will not prevent other merchandisers from entering the market and competing with the independent dealers. I believe that existing Federal and state law affords ample protection of rights of dealers without the necessity of bringing into being a completely devastating limitation upon the major producers and refiners. To me it is too severe a limitation upon free enterprise. It is my opinion that if the statute is upheld the ultimate effect upon Phillips will be to completely alter its marketing concept for the state; an alternative plan of marketing would have to be developed. If the statute is upheld, Phillips and other producers and refiners will not be able to own and operate a single retail station within the State of Maryland located on property which they own and/or possess. This interference with retail marketing would, in my opinion, destroy flexibility in operation of service stations which is absolutely essential to the retention of a healthy competitive market place.

16. There are many business entities that sell petroleum products at retail in Maryland which are not affected, or would appear not to be affected, by the Maryland statute. Examples are department stores, various grocery stores and convenience stores. Also, the majority of private branders and independents of all sizes are not affected by the law because they are not producers and refiners; it affects only integrated major oil companies.

I HEREBY CERTIFY, that on this 29th day of Sept., 1975, before me, a Notary Public for the State and County aforesaid, personally appeared R. A. KURLAND, known to me (or satisfactorily proven to be) the person who made oath in due form of law that the matters set forth hereinabove are true and correct to the best of his knowledge, information and belief.

/s/ R. A. Kurland
/s/ Betty J. Daniel
Notary Public

My Commission Expires July 15, 1979.

APPENDIX F

Stipulation of Facts Particular to Petroleum Marketing Corporation and Commonwealth Oil Refining Company, Inc.

1. Petroleum Marketing Corporation is a Delaware Corporation qualified to do business in the State of Maryland ("PMC") and Commonwealth Oil Refining Company, Inc., is a Puerto Rico Corporation ("Commonwealth").

2. Commonwealth, a company organized in 1953, is directly engaged in the refining of petroleum products and, through subsidiary corporations and joint ventures, is engaged in the production of aromatics and other petrochemicals. These activities are carried on at a petroleum refinery and petrochemical complex located at Penuelas, Puerto Rico. Commonwealth has no plant or facilities in the State of Maryland.

3. All of Commonwealth's activities are related to petroleum and products derived from petroleum. Commonwealth is totally dependent, for its crude oil supplies, upon foreign sources.

4. Since 1970, Commonwealth has marketed gasoline, motor fuels and lubricants through PMC which (in June, 1975), was operating 123 retail gasoline stations, under the federally-registered trademark "SCOT", in the Middle Atlantic and Northeastern States.

5. PMC has been engaged in the sale of petroleum products at wholesale and retail in the State of Maryland since 1955. PMC makes retail sales of gasoline and other petroleum products in intrastate and interstate commerce through 20 gas-only outlets and one commissioned agent relationship (which sells gasoline at wholesale and retail), located in the State of Maryland, as indicated on the attached map (Attachment A); PMC employs 196 persons at its Maryland retail facilities.

6. PMC does not change or alter the molecular structure of the refined products that it distributes in any of its facilities, storage tanks or stations in the State of Maryland. The products that PMC handles and distributes either for itself or others, enter PMC facilities from its supplier, Commonwealth, and leave in their original form.

7. All "SCOT" retail facilities in the State of Maryland are company-owned and company-operated by PMC. PMC has traditionally attempted to sell gasoline and motor oils in Maryland at a price less than those generally charged by major oil companies. "SCOT" retail outlets do not provide services such as repairs, oil changes and greasing, available at most service stations. "SCOT" retail facilities do not sell tires, batteries or other accessories available at most service stations.

8. Beginning in April of 1970 when PMC was acquired by Commonwealth, it has purchased the major

quantity of the gasoline offered for retail sale at its 20 Maryland "SCOT" retail facilities from Commonwealth. In recent months, the price of gasoline purchased by PMC from Commonwealth has increased.

9. Commonwealth and PMC have only the stated business relationship with "SCOT" retail gasoline outlets in the State of Maryland; neither company has any dealership or franchised arrangement at any "SCOT" retail outlet.

APPENDIX G

Stipulation of Facts Relating Specifically To Ashland Oil, Inc.

1. Ashland Oil, Inc. ("Ashland") is a Kentucky corporation with its principal offices at P.O. Box 391, Ashland, Kentucky 41101.

2. Ashland Petroleum Company, is a wholly owned subsidiary of Ashland Oil, Inc., primarily engaged in the business of refining crude oil and the transportation and marketing of petroleum products. Ashland does engage in some exploration for, and production of, crude oil. However, Ashland's crude production (approximately 30,000 barrels per day in 1974) represents less than 15% of the crude oil which it refines daily in its refineries. Ashland purchases 85% of the crude oil used in its refineries from sources it neither owns nor controls.

3. Ashland has seven crude oil refineries with an aggregate refining capacity of approximately 385,000 barrels per day. These refineries are located in the

Eastern and Upper Midwestern regions of the United States: two are in Kentucky, two are in Ohio, one is in Minnesota, one is in New York and one is in Pennsylvania.

4. Ashland engages in no crude oil production and has no petroleum refineries within the State of Maryland. Ashland's operations in Maryland are limited to the supplying and marketing of petroleum products.

5. None of the petroleum products which Ashland supplies or markets in Maryland come from an Ashland refinery. All of the petroleum products sold in Maryland, either to an Ashland customer or through an Ashland owned filling station, are purchased from another oil company through exchange agreements. All of the petroleum products sold by Ashland at retail in Maryland are transported into Maryland in interstate commerce.

6. Ashland owns and operates with company personnel only 17 filling stations in Maryland, under trade names "Redhead," "Bi-lo," "Payless," and "Hi-Fi." Of these 17 stations, 7 are located in the Baltimore vicinity; the others are located in White Marsh, Aberdeen, Laurel, College Park, Cambridge, Cumberland, Adelphi, Suitland and Salisbury. These "gasoline-only" stations, either have no service or car wash bays, or have them sealed off. They do not sell tires, batteries, or accessories, and have no travel maps or other traveler aids. Ashland does not provide credit cards to these stations and engages in no advertising of the brands Redhead, Bi-Lo, Payless, or Hi-Fi.

7. Ashland does not market gasoline at retail in Maryland at any other facility other than those listed above. Ashland, *has never* sold gasoline in Maryland

through independent retailers known as "branded" dealers or "lessee" dealers. No gasoline is sold in Maryland under the "Ashland" brand. Ashland has owned and operated company-owned filling stations in Maryland continuously since 1961.

8. Ashland's investment in the above filling stations as of September 30, 1974, was $2,381,385.

9. The following table sets forth Ashland's volume of sales of gasoline in Maryland in gallons through its 17 filling stations during 1971, 1972, 1973 and 1974.

1971	20,255,934
1972	25,989,410
1973	30,498,150
1974	26,959,471

10. The normal hours of operation for Ashland's stations are 6:00 A.M. to 12:00 P.M. each day. Ashland employs approximately 220 persons in its marketing operations in Maryland.

11. In states other than Maryland, Ashland markets petroleum products through 699 company operated stations and 640 independent leased "dealer" stations. Of the company operated stations, 698 are gasoline only stations, of which 193 are self-service, and 1 is a conventional service station. Of the 640 dealer stations, none are gasoline only; all are conventional stations.

12. John Vernon, Association Administrator for Fuels Management, Office of Operations, Regulations and Compliance of the Federal Energy Administration, is called by Ashland as a witness in this proceeding, would testify to the facts set forth in his sworn affidavit (appended hereto as Exhibit A), as filed in the United States District Court for the District of New Jersey on July 31, 1975 in *Exxon v. FEA, et al.*, Civil

No. 75-150. Exhibit B hereto is a copy of an exhibit filed by the Federal Energy Administration in the action identified in paragraph 14 above.

Consented to by Counsel:

/s/ Fred W. Drogula
Ginsburg, Feldman and Bress
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Attorney for Ashland Oil, Inc.

/s/ John A. Woodstock
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Attorneys for Defendants

In the United States District Court
for the District of New Jersey

Civil Action No. 75-150

Exxon Corporation,
Plaintiff,

v.

Federal Energy Administration
and
Frank G. Zarb,
Defendants,

Ashland Oil Company,
Intervenor,

Independent Refiners Association
of America,
Intervenor.

CERTIFICATION OF VERNON AFFIDAVIT

I hereby certify that the attached copy of the Affidavit of John Vernon, dated January 21, 1975, which I understand is to be filed with this Court on August 1, 1975 in connection with the above-referenced litigation as Exhibit A to defendants' memorandum, is a true and correct copy of said Affidavit as originally signed by me in January 1975.

JOHN VERNON

Subscribed and sworn to before
me this 31st, day of July, 1975.

NOTARY PUBLIC

My commission expires:

EXHIBIT A

AFFIDAVIT OF JOHN VERNON

I, JOHN VERNON, being first duly sworn, on oath, depose and state as follows:

1. I am Associate Assistant Administrator for Fuels Management, Office of Operations, Regulations and Compliance of the Federal Energy Administration ("FEA"). Prior to joining FEA's predecessor agency, the Federal Energy Office ("FEO"), on February 25, 1974, I was associated with Creole Petroleum Corporation, a Delaware corporation affiliated with the Exxon Corporation and headquartered in Caracas, Venezuela. My last position at Creole was as Senior Advisor. I hold a Bachelor of Science degree in Chemical Engineering from Massachusetts Institute of Technology and a Master of Business Administration degree from Harvard University. I was an active participant in FEA's decision to implement the cost equalization program described below, and my office is responsible for the administration of that program.

I. The Emergency Petroleum Allocation Act of 1973 and Agency Regulations Relating to Crude Oil.

A. Requirements of the Emergency Petroleum Allocation Act

2. FEA is responsible for the development and implementation of a program for the mandatory allocation and pricing of crude oil, residual fuel oil and each refined petroleum product under the Emergency Petroleum Allocation Act of 1973 ("Allocation Act"), which became law on November 27, 1973. In Section 4(b)(1), Congress specified objectives which must be met, "to the maximum extent practicable," in any allocation program, including the following:

> "(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers;
>
> * * *
>
> "(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions of the United States and sectors of the petroleum industry, including independent refiners, small refiners, non-branded independent marketers, branded independent marketers, and among all users;
>
> * * *
>
> "(H) economic efficiency; and
>
> "(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

3. In Section 4(c)(1) of the Act, Congress required that the mandatory allocation program for crude oil shall, "to the extent practicable and consistent with the objectives of subsections (b) and (d)," result in the allocation of crude oil to each "small refiner" and each

"independent refiner" in an amount not less than the amount sold or otherwise supplied to such refiner during the corresponding period of 1972, adjusted to provide for the aggregate shortfall, if any, in total crude supplies under 1972 levels. The term "independent refiner" is defined in Section 3(3) of the Allocation Act as any refiner that obtains more than 70 percent of its refinery input from sources not subject to its control and which markets a substantial portion of its gasoline through independent marketers. The term "small refiner" is defined in Section 3(4) of the Allocation Act as any refiner whose total refinery capacity does not exceed 175,000 barrels per day.

B. FEA's [illegible] Regulatory Program Relating to Crude Oil

4. The principal components of the regulatory program, other than the cost equalization program at issue here, which have been devised by FEA to regulate the allocation and pricing of crude oil, are described briefly in the paragraphs below. Each of these programs is currently in effect and operates in conjunction with the cost equalization program.

(1) The Two-Tier Pricing System

5. Beginning in 1971, a series of "leapfrogging" settlements were entered into between members of the Organization of Petroleum Exporting Countries and the major international oil producers which rapidly increased the posted price of crude oil, each settlement being somewhat higher than the last and each driving up the price of crude oil in the world market, including the price of domestic crude oil. Then, during the Summer of 1973, the Organization of Petroleum Exporting Countries, by concerted action, raised their

oil prices substantially above previous levels. For at least the previous 10 years, the U.S. had grown increasingly reliant on foreign crude oil due largely to a leveling off of domestic production, and therefore the nation had no choice but to accept the 1973 price increases if current levels of supply were to be maintained. Thus, in August 1973, when the Cost of Living Council devised a system of price controls for the petroleum industry, it concluded that, while most domestically-produced crude oil had to be subjected to ceiling price controls to minimize as much as possible the inflationary impact of worldwide oil price increases, certain domestically-produced crude oil had to be exempted from ceiling prices to encourage domestic production over the long run.*

6. The solution was the "two-tier" price system for domestic crude oil, promulgated by the Council on August 19, 1973 as part of the Phase IV petroleum price regulations (6 C.F.R. § 150, Subpart L) and subsequently adopted on January 14, 1974 as Part 212, Subpart D of the FEO Mandatory Petroleum Allocation and Price Regulations. Briefly, under the two-tier pricing system, FEA imposes a ceiling price on domestic crude oil produced from a given property when production is at or below the level of production from the same property in the same month of 1972 (*i.e.*, "old" oil). This ceiling price is basically the May 15, 1973 posted price plus $1.35, or about $5.25 per barrel on the average.* Crude produced in excess of 1972

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*The first sale of imported crude was also exempted from ceiling prices because it was not possible to obtain sufficient imported supplies at a controlled price.

*More specifically, under Section 212.73 of FEA regulations, the ceiling price for a particular grade of domestic crude in a [footnote continued]

production levels from the same property (*i.e.*, "new" oil) is exempt from price controls, and each barrel of new oil produced releases from price controls a barrel of old oil (*i.e.*, "released" oil). Thus, for example, if a particular property produced 100 barrels per day in 1972 and 110 barrels per day in 1974, 90 barrels would have to be sold at the FEA-imposed ceiling price, and 20 barrels (10 barrels of "new" oil plus 10 barrels of "released" oil) could be sold at the free market price. Also exempted from price controls were (i) by Congress in the Allocation Act, the first sale of crude oil produced from "stripper" wells (*i.e.*, wells which produce less than 10 barrels per day) and, (ii) by FEA in its regulations, the first sale into U.S. Commerce of imported crude oil.

7. Crude oil prices are significant not only at the producer level, but also at the refiner level and at the marketing level (*i.e.*, the resellers of refined petroleum products), since FEA regulations permit refiners and resellers to *pass through* increased crude oil costs in the sale of refined products. Under the price rules, a refiner may charge no more than its May 15, 1973 price on a given product plus an adjustment for net increases (over May 1973) in the cost of crude oil (foreign and domestic) and purchased refined products. Basically, a refiner's prices will reflect its average weighted crude oil costs plus its May 15 profit margin or markup. While May 15 profit margins may vary slightly from firm to firm, the largest contributor to varying lawful prices charged by refiners is the difference in average weighted

particular field is (i) the highest posted price for that grade of crude at that field on May 15, 1973 or, in the absence of such a price, the posted price for comparable crude at the nearest field on that date, plus (ii) a maximum of $1.35 per barrel.

crude costs attributable to the operation of the two-tier pricing system. These different lawful prices are passed on at the wholesaler and retailer level as such resellers are required to remain within their May 15, 1973 markup on products, while passing through any increased product costs from their suppliers.*

(2) The December 1 Rule — Section 211.63(a)

8. The imposition of the Arab oil embargo in October 1973 and the sharp increases in the posted prices of foreign crude oil greatly intensified the demand for price-controlled domestic crude oil during the Fall of 1973. Shifting of normal supplier/purchaser relationships was occuring during December 1973 in anticipation of the new regulatory program required by the Allocation Act of November 27, 1973, which many refiners assumed would result in a freeze of contractual relationships between suppliers and purchasers, but not before the end of 1973. In response to these considerations, FEA adopted the so-called "December 1" rule of §211.63(a), which provides in substance that supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973 shall remain in effect for the duration of the crude oil allocation program. While the December 1 rule freezes supplier/purchaser relationships and maintains essential supply channels, the rule was not designed to and does not achieve a full

*FEA's price regulations carry out the provisions of Section 4(b)(2) of the Allocation Act, which provide that in specifying prices for allocated products (or in prescribing the manner for determining them), FEA must use a single date in computing the base prices at all levels of marketing and distribution and FEA must permit a "dollar-for-dollar pass through" of net increased product costs to all marketers and distributors at the retail level.

and *equitable* allocation of price-controlled old oil, the goal FEA's cost equalization program is intended to achieve.

(3) The Crude Oil Mandatory Sales ("Buy/Sell") Program

9. Another major element in FEA's crude oil regulatory program is the Mandatory Crude Oil Sales Program set forth in 10 C.F.R. §211.65. The purpose of this program is to correct the supply imbalances between the major integrated refiners on the one hand – which have relatively greater direct control over both domestic and foreign crude oil production – and the small and independent refiners on the other – which had been dependent upon foreign crude oil or upon domestic crude oil delivered by the majors which, in turn, replaced it with relatively inexpensive foreign crude oil. Furthermore, because of the increasing price disparity between foreign and domestic crude oil, the buy/sell program was also designed as a pricing mechanism by which small and independent refiners would be given *some* access to the benefits of price-controlled domestic crude oil. Thus, the buy/sell program has served both a supply and a pricing function. As described below, the program's supply objective is to assure each small and independent refiner preferential allocations so that they may obtain volumes not less than the volumes they had in 1972. See Allocation Act, Section 4(c)(1). With respect to price considerations, buy/sell program sales are basically made at a refiner-seller's weighted average price (with certain adjustments), thereby giving small and independent refiners some access to the benefits of price-controlled oil and ameliorating, to some extent, the overall price inequities that would otherwise prevail as a result of

uneven distribution of price-controlled crude oil among refiners.

10. Under the buy/sell program, each "small refiner" and "independent refiner" (as those terms are defined in Sections 3(3) and 3(4) of the Act, respectively) is entitled to purchase in each three-month allocation quarter an amount of crude oil equal to the difference between (1) one-quarter of the crude oil it refined (*i.e.*, its "runs to stills" or "crude runs") during the year 1972 and (2) the volume of its runs to stills during the period February through April 1974 (without regard to buy/sell purchases or sales by the refiner during that period), subject to certain adjustments not pertinent here. Purchases by small and independent refiners, called "refiner-buyers," are made from the 15 U.S. refiners which are neither "small" nor "independent" within the meaning of the Allocation Act. This group, called "refiner-sellers," includes the 15 largest integrated oil companies in the United States, except for several firms classified as independent refiners by reason of their relatively small amount of controlled production. Each refiner-seller's share of the total sales obligation under the buy/sell list is fixed; it is the ratio of each refiner-seller's refinery capacity to that of the total refinery capacity of all 15 refiner-sellers as of January 1, 1973.

11. FEA's special pricing rules governing allocation sales of crude oil under the buy/sell program, 10 C.F.R. §212.94, provide that a refiner-seller may charge the weighted average price of all crude oil delivered to it in the area of the country where the sale is made in the month in which the sale is made. The seller may also add to the price a "handling fee" of 30 cents per barrel and may adjust the price to take into account the fact

that the crude oil sold may be of a higher or lower grade than the seller's average grade. Further adjustment may be made, if necessary, to shift to the buyer transportation costs associated with the sale. The program also allows a refiner-seller to pass through on a dollar-for-dollar basis in its prices for refined petroleum products any increased costs related to replacing allocated crude with higher-priced, foreign crude oil. 10 C.F.R. §211.83(c). Therefore, a refiner-seller is permitted by FEA's pricing rules to recover fully the product and non-product costs associated with sales made under the program.

II. *The Cost Equalization Program.*

12. The newest component in FEA's regulatory program concerning crude oil is its Cost Equalization Program, 39 F.R. 42246 (December 4, 1974), the development and specifics of which are described in the paragraphs that follow.

A. Introduction

13. As previously noted, not all crude oil refined in the United States is subject to FEA's ceiling price regulations. Imported, new, released and stripper well oil, constituting approximately 60 percent of all crude oil runs to stills in domestic refineries, is priced at essentially the world market, while the balance, old oil, representing approximately 40 percent of all crude runs domestically, is subject to the ceiling price regulations. However, because of the two-tier pricing system and the dramatic price increases of foreign crude oil over the

last year, as a result of the Arab oil embargo and concerted action taken by the Organization of Petroleum Exporting Countries, a substantial difference has developed between the average price of domestic old oil and free or world market prices of crude oil.

14. When the Cost of Living Council imposed controls on old domestic crude oil in August 1973, the per barrel price was set at May 14, 1973 posted prices plus $.35, which resulted in an average price of approximately $4.25, and remained there until the price was raised $1.00 to the current level of approximately $5.25 per barrel on December 19, 1973. During this same period, however, posted prices on representative foreign crude oil (Arabian light crude) increased over eight dollars per barrel, from approximately $3.07 per barrel in August 1973 to approximately $11.65 in January 1974. The increase in foreign crude prices has also increased domestic prices on new, released and stripper well oil to a current price in excess of $10.00 per barrel, as compared with an August 1973 price of around $5.00.

15. With the growing differential between the ceiling price for old oil and free market prices for stripper, new, released and imported oil, the uneven distribution of old oil among all refiners (particularly as it affected certain small and independent refiners) began to show up in significant price differences among such refiners in sales of refined products. Since refiners' prices on refined products are a function of their May 15, 1973 prices plus their increased crude oil costs, these price differentials were directly attributable to the different proportions of old oil which such refiners used to

compute their overall increased crude oil costs.* Furthermore, price differentials among refiners were, of course, thereafter translated into price differentials at wholesale and retail levels as independent marketers passed through their increased product costs on a dollar-for-dollar basis.*

16. During the shortages of last Winter and Spring, these price differentials were passed through to the ultimate consumer with the anamolous result of purchasers paying significantly different prices for the same product. With the relaxation of the severe, worldwide supply shortage, following the termination of the Arab oil embargo, price competition began to reemerge for certain products. While the differences in refiners' average crude oil costs remained, competition in the marketing of refined products caused the differences in retail prices to be narrowed.

17. To meet competition, however, many refiners and marketers (with higher input costs) had to endure a severe cost-price squeeze. Many small and independent refiners and independent marketers—unable to absorb

*As shown in Attachment A hereto, a graph of refiner crude costs, the price disparity caused by the two-tier pricing system has created a considerable range of crude oil costs. For example, in May 1973, prior to the implementation of the two-tier system, the average composite crude cost for major integrated refiners was approximately $3.82 per barrel, while the average cost for small and independent refiners was about $3.91. A considerable disparity in average composite crude costs, however, had developed by July 1974: the average composite crude cost for major integrated refiners was around $9.08 per barrel; the average cost for small and independent refiners was about $9.96. This disparity, although now slightly reduced by sales under the buy/sell list, is nevertheless still significant.

*An "independent marketer" is a person who is not a refiner and who is engaged in the marketing or distributing of refined petroleum products/ See Allocation Act, §3(1)(2).

the full amount of such costs—were required to charge higher prices for their products with a consequential loss of market shares. The adverse effects of increased costs were felt especially at the marketing level. In many cases, high-cost, independent and small refiners were supplying their marketers at roughly the same cost as the retail-prices of major branded marketers. The inevitable result for many marketers was a drastic reduction in sales volume or continued operations at a loss.

18. In short, the two-tier crude oil pricing structure, which was deemed necessary to minimize the inflationary impact of world crude oil prices and to maintain incentives for domestic production, created economic distortions and interfered with market mechanisms because of the uneven distribution of old crude oil among domestic refiners. Moreover, since independent marketers and many small and independent refiners were disadvantaged by this development, the distortion threatened the competitive viability of the independent sector of the petroleum industry.

19. As previously noted, FEA's December 1 rule and buy/sell program did not offer a complete solution to the conditions which had developed. FEA's December 1 rule had been only partially successful in addressing the problem of unequal crude oil input cost to refiners. By freezing all crude oil supplier/purchaser relationships as of December 1, FEA prevented further moves by the major integrated refiners to divert crude oil, including low-cost old oil, to their own refineries. The December 1 "freeze," however, did not assure the equitable allocation of old oil. The price rules governing sales made to comply with the mandatory crude oil allocation program—the buy/sell program—had a modest

cost equalization effect on the small and independent refiners benefiting from that program. That cost equalization effect, however, was insufficient, since that program was principally designed to assure adequate supplies and the firms entitled to purchase the highest volumes of crude oil under that program were not necessarily the ones suffering the most from a lack of access to low-cost old oil.*

20. FEA was thus confronted with conditions which ran contrary to various objectives of the Allocation Act. With the relaxation of the worldwide shortage, an uneven distribution of old oil (which, given demand, is and will remain in short supply) began to produce economic distortions which, contrary to the Allocation Act, interfered with the normal (and desirable) operation of market mechanisms, *i.e.*, price competition. Section 4(b)(1)(I). Further, the price differentials encountered at all levels of the distribution chain ran counter to the statutory objective of equitable allocation of refined products at equitable prices among all regions of the U.S., all sectors of the petroleum industry and among all users. Section 4(b)(1)(F). Finally, the impact of these developments on independent marketers and many small and

*Although there are comparative surpluses of crude oil on the world market and the cost equalization program (which in large part supplants the cost equalizing function of the buy/sell program) has now been adopted, there are still important reasons for retaining the buy/sell program. First; as described below, entitlements are issued based on volumes of crude runs, and small and independent refiners need a regulatory guarantee of purchases under the buy/sell list to maintain run levels. Second, a significant number of small and independent refiners, due to their location or other factors, are physically unable to receive crude supplies in the world market and must rely on their rights to purchase crude oil under the buy/sell program.

independent refiners ran counter to FEA's special mandate to protect the competitive viability of these components of the petroleum industry. Section 4(b)(1)(D).

21. For all of these reasons, FEA felt compelled to take action to correct the consequences of the inequitable allocation of old oil. The objective was clear – to assure equal access to the benefits of low-cost, domestic crude oil so that all refiners and all marketers would have roughly comparable input costs.* Input costs were comparable in the petroleum industry prior to the rapid rise in world oil prices and that situation would have continued *but for* FEA's mandate to regulate prices on domestic crude oil and the resulting two-tier pricing system.

22. To accomplish this goal, FEA could have simply allocated old crude oil equitably among all refiners and required the actual transfer of voluminous amounts of old oil. This approach, however, would have entailed enormous administrative burdens, both to the government and to the industry. As such, the scheme was rejected as contrary to the statutory goal of economic efficiency. Section 4(b)(1)(H). Instead, FEA devised a means of achieving the equitable allocation of old oil through the issuance of "entitlements".*

*Or stated another way, the objective was to insure that all refiners and marketers *shared equally* in the benefits of price-controlled oil *and* the burdens of free market price oil.

*FEA's decision, moreover, takes into account the fact that even if FEA had required a system of physical allocation of old oil among all refiners, under FEA regulations, refiners probably would have undertaken "exchanges" in order to minimize unnecessary movements of oil. For example, a refiner with more than its share of old oil (*i.e.*, a "refiner-seller" who would be

[footnote continued]

23. Under FEA's cost equalization program, in order for a refiner to keep barrels of old oil in excess of its proportionate share of old oil, it must purchase an "entitlement" from a refiner who has less than its proportionate share of old oil. To effectuate this system, FEA issues each refiner enough entitlements to refine the same proportionate share of old oil as any other refiner. A refiner with more than its share of old oil will have to buy entitlements to cover those extra barrels of old oil; a refiner with less than its share will have excess entitlements which it can sell. In this manner, all refiners share equally in the benefits of the two-tier pricing system.

24. The results of buying and selling entitlements are precisely the same as if old oil were physically allocated among all refiners; namely, refiners will have roughly equal average weighted crude oil costs. This is accomplished by treating the cost of an entitlement a

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required to sell old oil to a refiner with less than its share) probably would have swapped such old oil for a refiner-buyer's new, released, stripper or imported oil rather than transship the old oil and purchase other crude oil to replace it. The refiner-seller would charge approximately $5.25 for each barrel of old oil required to be sold and would have to pay roughly $10.25 for each barrel of new, released, stripper or imported oil acquired in the exchange. However, since neither refiner would, in all likelihood, want to transship physically the oil, they could "net out" the transaction and the refiner-seller would pay $5.00 per barrel (the difference between the two prices) to the refiner-buyer for the right or "entitlement" to keep the price-controlled old oil at its refinery. If all refiners engaged in such swaps and accounted for the old oil that was required to be sold as a paper transaction, the result would be the same as an actual physical allocation of old oil. Similarly, the entitlements program, as devised, fully recognizes these practical considerations and achieves the end results of physical allocation without actually requiring unnecessarily burdensome physical transshipments.

refiner purchases as part of its crude oil costs and by requiring the proceeds from the sale of an entitlement to be offset against the crude oil costs of the refiner selling the entitlement. Through this mechanism, FEA is able to minimize the economic distortion caused by the two-tier pricing system by distributing equitably to all refiners the benefits created by FEA's price controls on old oil. In other words, FEA's cost equalization program does no more than insure that certain elements of the petroleum industry are not given an undue competitive advantage *solely* because of the two-tier pricing system.

25. Furthermore, the effects of cost equalization at the refiner level will, of course, filter down the distribution chain to wholesalers and retailers, thereby minimizing adverse, downstream effects on marketers of petroleum products and preserving the competitive viability of independent marketers. Inequitable price differentials to consumers in the same or different regions of the country will also be eliminated. Accordingly, the market mechanism of price competition can operate without the distortions produced by inequitable distribution of low-cost product among the various sectors of the industry.

26. To make this cost equalization program work and to be consistent with its overall purpose and rationale, FEA concluded that it was also necessary to issue entitlements to certain importers of refined petroleum products. Basically, FEA concluded that it would be inequitable to address the problem of disproportionately high product costs to independent marketers who buy from domestic refiners dependent upon foreign crude oil and to ignore the plight of independent marketers who purchase finished products

from foreign or offshore refineries. For FEA felt that Congress was no less concerned with the competitive viability of this latter group of independent marketers. See Allocation Act, § 4(b)(1)(D). Further, the goal of insuring the sale of refined products at equitable prices among all regions would not have been met by a cost equalization program which ignored the fact that certain regions are more heavily dependent than others on imports of finished products. Accordingly, FEA's cost equalization program was designed, "to the maximum extent practicable," to provide all refiners and independent marketers (regardless of their source of supply) an equitable share of the benefits of price-controlled, old oil.

B. Rulemaking Proceeding.

27. FEA initiated its expansive, three-month rulemaking proceeding concerning the allocation of old oil with a notice issued August 28, 1974, 39 F.R. 31650 (August 30, 1974). The notice of proposed rulemaking, Attachment B, contained the principal proposal and four alternatives, on all of which comments were requested.*

28. Following the publication of the August 28, 1974 notice in the *Federal Register*, the agency received

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*In addition to the main proposal and the four alternative proposals, the August 28 notice also requested comments on several issues relating to the principal proposal. These issues included: basing entitlement issuances on refinery runs rather than capacity; special provisions for processing agreements for non-refiners; criteria that could be utilized to determine if a refiner was operating at reduced levels due to entitlements sales; the desirability of providing for a weighted entitlement distribution in favor of small refiners; and not requiring the participation of refiners with old oil supply-to-capacity ratios within a specified percentage range.

over 600 written comments from interested parties, and public hearings were held on September 24 and 25, 1974, at which statements were presented by over 40 interested parties. After carefully considering the contents of all written comments received and testimony presented, FEA significantly modified its original proposal and, on November 7, 1974, issued a further notice of proposed rulemaking. 39 F.R. 39740 (November 11, 1974). The further notice of proposed rulemaking, Attachment C, contained a proposal which substantially followed the form of the principal August 28, 1974 proposal, but with at least three significant modifications.

– A provision was added making a defined class of marketers historically reliant on certain imported finished products eligible to receive entitlements for imported residual fuel oil, home heating oil and No. 2-D diesel fuel. For each month, importers were to be issued that number of entitlements whose value equaled the difference between the weighted average cost of the imported product and the weighted average cost of the domestic product.

– The August 28, 1974 proposal had specified that entitlement calculations would be based upon each refiner's total current refinery capacity, but invited comment as to whether the volume of a refiner's crude oil runs to stills (*i.e.*, barrels of crude oil actually refined) should instead be used as the basis for entitlement calculations. After receipt of numerous comments on this issue, FEA, in the November 7, 1974 further notice, proposed utilizing crude oil runs to stills as the basis for issuance of entitlements.

– The August 28, 1974 proposal also solicited comments on alternative provisions for a weighting in the calculation of the amount of entitlements to be distributed to small refiners. The small refiner "bias" provided for in the November 7, 1974 further notice was based on the sliding scale used in determining the issuance of oil import tickets under the Oil Import Regulations. Thus, in addition to receiving entitlements under the general provisions of the program, small refiners with daily average volumes of crude oil runs to stills of less than 175,000 barrels were to receive a percentage of entitlements that increased in inverse proportion to their volume of crude runs to stills.

29. Over 175 comments were received by FEA with respect to the further notice of rulemaking. After carefully considering the contents of the written comments received, FEA, on November 29, 1974, issued and adopted the final rule for the allocation of old oil. Attachment D, 39 F.R. 42246 (December 4, 1974). The final rule revised the November 7 notice in two respects. First the small refiner "bias" contained in the November 7 notice was determined to be insufficient to ensure the competitive viability of small refiners. Thus, the final rule provides for an increased bias by making it equivalent to the maximum economic preference historically received by small refiners under the Oil Import Regulations. Second, the final rule modified the basis on which entitlements are issuable to importers of residual fuel oil and home heating oil. FEA determined that importers of residual fuel oil should receive entitlements on the same basis as imports of home heating oil, and that a fixed fractional entitlement value per barrel of imports should be established. See paragraph 35 below.

30. Since the issuance of the final rule, FEA has taken two substantive actions relating to the old oil allocation program. First, pursuant to 10 C.F.R. § 211.67(i)(4), the agency set the value of an entitlement at $5.00 for the month of November 1974, the first base month to which the cost equalization program applies. 39 F.R. 43103 (December 10, 1974). The other action taken by FEA was to amend the November 29, 1974 rule, on an emergency basis, so as to allow those small refiners which, because of relatively high-level old oil runs, would be *buyers* of entitlements to phase into the program over a three-month period. Attachment E, 39 F.R. 43814 (December 19, 1974).*

C. Principal Features of the Cost Equalization Program

31. As earlier described, FEA devised a means for achieving the equitable allocation of the old oil through the issuance of entitlements rather than through the physical allocation of voluminous amounts of old oil. FEA's program provides that each refiner will be issued that number of "entitlements" for each month equal to that refiner's proportionate share of old oil in the U.S., adjusted upward if the refiner is a beneficiary of the small refiner bias. Additionally, a limited number of eligible firms (including refiners) which import residual fuel oil and home heating oil (which includes No. 2-D diesel fuel) are issued entitlements based on the volume of such products imported. An "entitlement" is defined as the right of a refiner owning the entitlement to include one barrel of old oil in its adjusted crude oil

*On December 20, 1974, FEA also issued certain corrective and technical amendments to the cost equalization program, concerning the small refiner bias and the treatment of buy/sell sales. 39 F.R. 44710 (December 27, 1973).

receipts in a particular month.* Because the old oil allocation program is designed to remove inequitable conditions caused by the two-tier pricing system, the price of an entitlement has been set by FEA, with reference to the differential between controlled and uncontrolled crude oil prices, at $5.00. A refiner having a greater volume of old oil in its adjusted receipts than the volume permitted by entitlements issued to it is required to purchase, from a refiner or eligible firm that has entitlements available for sale, a sufficient number of entitlements to cover the excess.

32. *Refiner Entitlements.* The number of entitlements that a refiner receives is based on its percentage of old oil to its total crude oil runs to stills. 10 C.F.R. § 211.67(a)(1). The use of crude runs and the rejection of the use of refining capacity as a basis for entitlement calculations reflects FEA's recognition that utilization of refining capacity would result in less effective cost equalization relative to product output than use of crude runs to stills. Furthermore, the use of crude runs encourages full utilization of domestic refinery capacity, while the use of refining capacity would have provided an incentive to maintain idle, inefficient capacity. Substantial administrative problems concerning enforcement of minimum operating levels for refiners would also have been encountered under a capacity-based program.

*Refiners must differentiate between old, new and released oil for billing purposes, and billings often arrive late and are subject to further adjustments. Under the cost equalization program, such billings which have the effect of correcting the amounts of old oil run by a refiner in a prior month (not including months prior to the beginning of the program) are reflected in adjustments to the current month's receipts, in order that the program can remain current even if billings are not. (See definition of "adjusted crude oil receipts." 10 C.F.R. §211.62.)

33. In order to determine the precise number of entitlements issuable to a refiner, *i.e.*, a refiner's equitable share of the total volume of old oil received into inventories in a given month, a computation is made for each month to establish the "adjusted national old oil supply ratio," *i.e.*, the volume of old oil included in the aggregate crude oil receipts for all refiners, expressed as a percentage of the total volume of the crude oil runs to stills for all refiners for that month. For example, if the total number of barrels of old oil was 200 million and the total number of crude runs is 500 million, the old oil supply ratio is 2/5 or 40 percent. Thus, if all old oil were equitably allocated among all domestic refiners, each refiner would run 40 percent old oil. Since small refiners and importers of certain imported products (including refiners) will be issued entitlements in addition to those to be received on the basis of crude run levels, the total volume of old oil used to calculate the national ratio of old oil runs must be reduced by the number of entitlements so provided. Therefore, in the aforementioned example, the ratio would be determined as follows:

$$\frac{200 \text{ million} - x - y}{500 \text{ million}}$$

where x is the number of additional entitlements given to small refiners pursuant to the small refiner bias, and y is the number of entitlements given to eligible firms for imported products. Having established an adjusted national old oil supply ratio, that ratio is applied to each refiner's crude runs and each refiner receives entitlements for that percentage of its crude runs.

34. *Small Refiner Bias.* In addition to the number of entitlements it might otherwise receive as a refiner, a

small refiner (*i.e.*, having a refinery capacity of less than 175,000 barrels per day) has, as noted, an additional "bias" weighted in its favor. The amount of the bias, which on a percentage basis becomes greater as crude oil runs to stills become smaller, was intended to be at least equal to the dollar value (with an inflation adjustment) of the highest preference afforded small refiners under the Oil Import Program during that period when oil import tickets were selling above one dollar. This bias recognizes (i) the historical position of small refiners, (ii) the relatively higher operating costs and capital expenditures of small refiners and (iii) the fact that such small refiners in many cases must market (and traditionally have marketed) their products at a lower price than the products of the major branded refiners. Accordingly, in order to help preserve the competitive viability of this class of refiners, the program provides that refiners with a daily average volume of crude oil runs to stills of less than 175,000 barrels for a particular month shall be issued additional entitlements for each day of that month equal to an applicable percentage of that average daily volume. That percentage varies with the daily average volumes of small refiners' crude runs to stills for that month, up to 12.38 percent of daily average volume for refiners with a daily average volume of less than 10,000 barrels. 10 C.F.R. § 211.67(e).

35. *Importer Entitlements.* The decision to include a limited number of product importers in the class of persons eligible to receive entitlements was made in recognition of the Allocation Act's objectives of preserving the competitive viability of independent marketers and assuring the equitable distribution of refined products at equitable prices among all regions

and areas of the United States. Section 4(b)(1)(D), (F). Since a cost equalization program at the refinery level would not place marketers dependent on certain higher-priced, imported finished products in a competitive posture and since it would be unfair to equalize input costs for independent marketers dependent upon domestically-refined products, but not for independent marketers dependent upon foreign-produced products, FEA designed its cost equalization program so that marketers reliant upon certain imported finished products would be eligible to receive entitlements for their imports and could sell entitlements to refiners that need them.

36. Persons eligible for entitlement issuances are certain importers of residual fuel oil and No. 2 heating oil (which includes No. 2-D diesel fuel) referred to as "eligible firms." FEA regulations define an "eligible firm" so as to include only that well-defined group of historical marketers of such imported products. See 10 C.F.R. § 211.62. The "eligible products" were singled out for inclusion because they account for the major portion of finished product imports into the United States. The East Coast in particular is substantially dependent on imports of these products. Additionally, because of the volume of these products imported, they possess the greatest potential for significant adverse economic impact when import prices rise above prevailing domestic prices in the event of unexpected demand increases or supply shortages. Imports of other finished and unfinished products, on the other hand, are not as significant in the overall domestic market for petroleum products, and it was determined that inclusion of such products in the program would pose substantial administrative burdens and technical prob-

lems. Moreover, it was feared that inclusion of more products than necessary would create an undue incentive to import products and would operate as a disincentive to utilize and expand domestic refining capacity.

37. The rules for the issuance of entitlements to importers of No. 2 heating oil and residual fuel oil are as follow:

a. *No. 2 Heating Oil.* After considering the use of a system that would premise the issuance of entitlements upon the then prevailing differential between domestic and imported prices for the product on a weighted average basis across the nation, FEA concluded that such a system would be administratively infeasible. Difficulties in calculating this differential, given the variations in sulphur content as well as transportation differentials, make such a system unworkable. Moreover, since refiners sell at various prices to different classes of purchasers, FEA would have had to devise a system for obtaining a valid representative domestic price for comparison with the landed cost of imports. FEA thus determined that use of a fixed fractional entitlement value per barrel of imported heating oil offered an equally effective and administratively more feasible method for achieving the goal of protecting the competitive viability of independent marketers. Using current market differentials between imported and domestic heating oil, FEA concluded that a barrel of imported heating oil should be treated as equivalent to 30 percent of a barrel of crude oil included in a refiner's runs to stills. Thus, for every barrel of imported oil an eligible firm imports, entitlements will be issued with a value equivalent to .3 of the value of an entitlement

issued on a barrel of crude oil in a refiner's runs for the month concerned. For example, if the adjusted national old oil supply ratio were 40 percent and the value of an entitlement were $5.00, each refiner would receive .4 of an entitlement ($2.00) for each barrel of crude oil included in its crude runs, and each barrel of imported product would receive .3 of this entitlement value, or approximately .12 ($.60) of an entitlement. It is estimated that entitlements will translate into a value of approximately 1-1/2 cents per gallon for imports of heating oil.

b. *Residual Fuel Oil.* FEA concluded that imports of residual fuel should receive entitlements on the same basis as those of No. 2 heating oil. This approach minimizes economic distortion since heating oil is a major component in refinery blending of currently refined low sulfur residual fuel oils and has many of the same uses as residual fuel oil. Thus, the issuance of entitlements on the same basis to each category of imports will prevent undesirable shifts to middle distillate (heating oil) imports from residual fuel oil imports. See Allocation Act, § 4(b)(1)(I). Furthermore, because residual fuel users in many areas of the country must depend exclusively on imported product, failure to give them entitlements would mean they would not share proportionally in the benefits of the old oil allocation program, which otherwise would tend to equalize crude costs of domestic refiners. Finally, because the overwhelming majority of the residual fuel consumed in the United States is imported, the price of residual fuel oil consumed in the United States has been determined, for all practical purposes, by the landed cost of imports of this product. As a result, not only has the price of residual fuel oil moved above

its historical relationship to the price of other domestically-refined petroleum products, but consumers of residual fuel oil have been effectively precluded from participating in the benefits of FEA price controls on producer sales of domestic crude petroleum. Accordingly, FEA has taken steps to provide some degree of equalization with respect to imports of residual fuel oil, as it does with middle distillates, in order to insure equitable allocation of residual fuel oil at equitable prices among all regions of the United States, among all sectors of the petroleum industry and among all users. See Allocation Act, § 4(b)(1)(F).

38. *Entitlements Phase-In for Small Refiners.* As previously noted, subsequent to the issuance of the final regulation for the program, FEA concluded that a special provision was necessary to assist those small refiners required to purchase entitlements under the program to adjust on a graduated basis to their entitlement purchase obligations. In so doing, FEA recognized that the immediate imposition of the full entitlement purchase requirement could have a severe, short-term economic impact on certain of these small refiners and that such refiners would require a period of time to arrange necessary financing and to structure their marketing operations so as to minimize potential cash flow problems. This special provision, which was issued in the form of an emergency rule, provides that a small refiner, as to the first 30,000 barrels per day of its crude runs, does not have to purchase any entitlements for November, has to purchase only one-third the number it would otherwise have to purchase for December and has to purchase only two-thirds the amount that would otherwise be required for January 1975. For February 1975 and subsequent

months, small refiners will be required to meet their full purchase obligations.

39. *The Price of Entitlements.* FEA's entitlement program was devised to overcome the market distortions caused by the two-tier pricing system. Therefore, FEA elected to fix the price of entitlements on a monthly basis with reference to the differential between controlled prices of old oil and market prices of uncontrolled oil during the base month for which the price is set. The price for each entitlement to be transferred in January 1975, based on crude oil data for the month of November 1974, is $5.00 39 F.R. 43103 (December 10, 1974). The notice establishing the $5 price described why a price slightly less than the differential between controlled and uncontrolled prices was chosen:

> "Data available to FEA suggests that the differential between the weighted average price of old oil on the one hand, and new, released, imported and stripper well oil, on the other, is currently about $6. Because this is an estimate comparing averages, however, and because the prices actually being paid by refiners for both old and new oil vary considerably above and below the weighted averages, FEA has determined that $5 is an appropriate initial entitlement price. FEA believes that entitlement sales at this figure will substantially improve the competitive position of those refiners and marketers relying heavily on high-cost crude, while at the same time minimizing the possibility of overequalization, with its resultant inequity and economic distortion." *Id.*

40. FEA rejected the idea of letting the price of entitlements be negotiated because it foresaw the possibility of desperation pruchases or sales at un-

realistically high or low prices. Additionally, only eligible firms and refiners are allowed to purchase or sell entitlements, thereby eliminating the possibility that dealers or other middlemen will be encouraged to trade in entitlements. 10 C.F.R. § 211.67(i)(3)(i). To avoid hoarding of entitlements, the regulations require all excess entitlements to be sold, § 211.67(c), and FEA retains the authority to direct sales from a refiner or firm having such an excess to a refiner which has old oil receipts in excess of its entitlements. § 211.67(j).*

41. Finally, since the entitlement program is designed to effect a redistribution of costs, as alluded to earlier, all funds expended or received as a result of the purchase or sale of entitlements are subject to the general provisions of FEA's price regulations, which provide generally for a dollar-for-dollar cost pass through. This means that a refiner or importer which sells entitlements must count the receipts therefrom as a reduction of its crude oil or product costs. A refiner which must purchase entitlements, on the other hand, will be allowed to consider the cost of such entitlements as part of the cost of its crude petroleum. Therefore, since FEA pricing regulations allow increased crude oil and product costs to be passed through on a dollar-for-dollar basis, the effect of the cost equalization program will be to eliminate the gross disparities in

*On January 10, 1975, FEA issued a notice, Attachment F, specifying the adjusted national old oil supply ratio for the month of November, the name of each refiner or other eligible firm receiving entitlements, and the number of entitlements issued to that refiner or eligible firm. Required purchases of entitlements for the month of November must be made prior to January 31, 1975. FEA will hereafter publish a similar notice at the beginning of each month, containing information on transactions for the second month prior to the month in which such notice is published.

prices for the same product that have formerly prevailed at all levels of the distribution chain. It is anticipated that entitlements transferred in January 1975, the first month in which entitlements will be bought and sold, will result in some degree of cost equalization in February and will eventually bring prices into a much narrower range.

D. The Program Is Intended by FEA to Fulfill Various Objectives of the Allocation Act

42. As mentioned at the outset of the discussion of the cost equalization program, the disparity in average crude costs among refiners and the greater price competition accompanying recent periods of excess supplies of petroleum products have given rise to conditions requiring FEA action. These conditions have particularly affected small and independent refiners and independnet marketers. See Paragraphs 15-21 above. According to comments received by FEA in its rulemaking proceeding, many small and independent refiners have been forced to cut their margins and sustain reductions in their market shares as a result of their disproportionate reliance upon crude oil sold at uncontrolled prices (*e.g.*, new, released and imported).* The disparity in crude costs has also affected the competitive viability of a large segment of the independent marketing sector of the petroleum industry reliant upon products refined by high-cost refiners – in many cases, small and independent refiners, but in some instances, high-cost major refiners. Also, those marketers dependent upon high-cost imports of certain

*The dire circumstances confronting many small and independent refiners are reflected in comments filed with FEA, excerpts of which are found in Attachment G.

refined products, particularly No. 2 heating oil, have been placed at a competitive disadvantage.

43. FEA's cost equalization program is in direct response to these problems. As stated in the preamble to the November 7 further notice of rulemaking, the old oil allocation program was specifically designed by FEA to carry out, "to the maximum extent practicable," various objectives set forth in Section 4(b)(1) of the Emergency Petroleum Allocation Act:

> "To correct these inequitable conditions which FEA has found to exist, FEA intends to adopt this rule to allocate old oil equitably among all domestic refiners and to extend the benefits of such old oil to certain refined products at higher than domestic prices. FEA has concluded that the adoption of this proposed rule is within its authority under the Emergency Petroleum Allocation Act of 1973 (the "Allocation Act") to provide for the equitable allocation of crude oil and refined products, at equitable prices, among all regions of the United States, among all sectors of the petroleum industry and among all users [§ 4(b)(1)(F)]. . . . Moreover, adoption of this proposed rule is warranted to assure the preservation of an economically sound and competitive petroleum industry and, in particular, the competitive viability of independent refiners, small refiners, nonbranded independent marketers and branded independent marketers. [§ 4(b)(1)(D)] Elimination of the economic distortion caused by unequal access to price-controlled domestic crude oil will also minimize unnecessary interference with market mechanisms that would otherwise operate more effectively to help achieve the overall objectives of the Allocation Act. [§ 4(b)(1)(I)] Finally, FEA believes that the adoption of this proposed rule is a necessary precondition to any future relaxation or elimination of allocation or price controls." 39 F.R. 39740.

With respect to the objectives of the Act which FEA believes will be fulfilled by the issuance of entitlement benefits, to a limited category of eligible firms importing No. 2 heating oil and residual fuel oil, see Paragraphs 35-37 above.

44. Second, and equally important, is the fact that the program is based on the broad allocation and pricing mandate applicable to FEA under Section 4(a) of the Allocation Act.* Indeed, in connection with the legislation recently passed and signed into law extending the Allocation Act through August 31, 1975 (P.L. 93-511), both the Senate and the House called upon FEA to implement a cost equalization program under the authority granted to it in the Allocation Act. *See* S. Rep. No. 93-1082, 93d Cong., 2d Sess. at 2 (1974) (The Act "provides ample authority for the FEA to institute a system of price equalization to provide that all segments of the industry benefit from lower-priced domestic oil. The Committee was urged to amend the Act to achieve this objective but has been assured that the FEA intends to institute a price equalization program under existing authority in the immediate future."); H.R. Rep. No. 93-1443, 93d Cong., 2d Sess. at 3

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*Pursuant to Section 4(a), FEA is required to

"promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulations. . . ."

(1974) ("[T]he Act includes adequate authority to permit the FEA to institute a system of price equalization applicable to crude oil, residual fuel oil and refined products to eliminate the regional and competitive inequities which result from a dependence upon high-cost imported oils and petroleum products. The FEA's stated commitment to Subcommittee Chairman Macdonald during the hearings on this bill to move promptly on a price equalization program has convinced the Committee that specific amendments to the Act to compel such action may prove to be unnecessary.")

III. Lack of Irreparable Harm to Buyers of Entitlements.

45. FEA's cost equalization program will not cause irreparable damage to those refiners required to buy entitlements. Under the program and the refiner's price rule (10 C.F.R. § 212.83), the amounts expended to purchase entitlements are treated as product costs which may be passed along to customers, on a dollar-for-dollar basis, in the prices the refiner is allowed to charge for its refined products. Thus every cent expended by a refiner for entitlement purchases is allowed by FEA's price regulations to be recovered. To the extent that current competitive conditions will not allow full recovery of the costs of entitlements in current prices, a refiner may, under the pricing rules applicable to refiners, carry those costs over to subsequent months, when competition would not prevent their recovery at that time. 10 C.F.R. § 212.83.

46. During the rulemaking proceeding, FEA received and considered comments from some refiners

that they will nevertheless be injured by the program because they will no longer enjoy the competitive advantage of the lower crude costs which they are fortuitous enough to have. They argued that they might therefore suffer an irreparable diminution of their current market shares. While these consequences may possibly result from the program, FEA concluded that they are warranted in the circumstances and, in view of the profits being reported by many major oil companies, are not unjust or likely to threaten seriously their competitive viability. It should be emphasized that those refiners which are not required to buy entitlements under the old oil allocation program historically have had significantly lower crude costs than their competition due principally to the two-tier pricing system imposed on crude oil by the Cost of Living Council and then FEA. Thus, the competitive advantages that some refiners will lose as a result of these regulations were in large measure given them by other FEA regulations. The effect of the program will be, in effect, to return the industry to conditions extant in early 1973 when there was no great disparity between the prices of foreign and domestic crude oil.

47. A final reason that no refiner is likely to suffer irreparable injury is that any refiner suffering serious hardship or gross inequity as a result of the entitlements program may oətain appropriate administrative relief from the requirements of the program by filing an exception request with FEA's Office of Exceptions and Appeals. FEA has implemented an expedited procedure to deal specifically with requests for exception from the cost equalization program, see Attachment E, 39 F.R. 43814, and

one such request has already been granted in a joint application filed by the San Joaquin Refining Company and the West Coast Oil Company.

IV. Harm to FEA's Program and the Public Interest if an Injunction Issues.

48. Since the issuance of entitlements is calculated on the basis of the national old crude oil supply, an injunction relieving a single refiner from its obligation to purchase entitlements would cause a severe blow to the entire cost equalization program. Such an injunction would require a time-consuming recalculation of all entitlement issuances, would defer the operation of the program, pending a recalculation, for an indefinite period of time and, after the recalculation, the party obtaining the preliminary injunction would be placed at a competitive and financial advantage over those companies required to comply with the program. Further, these steps might be repeated several times as other refiners rush into other federal district courts seeking injunctive relief or such refiners may just choose to ignore the requirements of FEA's program. Accordingly, a court order preliminarily enjoining this program as to a single refiner would effectively disrupt the entire program for a considerable period of time. Moreover, any delay in the operation of the entitlements program will only serve to aggravate those serious problems outlined above confronting, among others, small and independent refiners and independent marketers. Thus, granting injunctive relief to an entitlement-buyer refiner would be contrary to public interest, because it would cause harm to those firms the Allocation Act was designed to protect, and

would be contrary to the objectives of the Allocation Act (*e.g.*, Section 4(b)(1)(D) and (F)).

/s/ John Vernon

Subscribed and sworn to before me
this 21st day of January, 1975.

/s/ Helen V. Allen
Notary Public

My commission expires: My Commission
Expires June 1, 1979

ATTACHMENT A

COMPARISON OF COMPOSITE PER BARRELL CRUDE OIL COSTS OF MAJOR INTEGRATED REFINERS AND SMALL AND INDEPENDENT REFINERS

A-1 – Graph

A-2 – Table of figures

COMPOSITE PER BARRELL CRUDE COST OF MAJOR INTEGRATED REFINERS AND ALL INDEPENDENT REFINERS

May 1973	
Major Integrated Refiners	$3.8207
Total Independent Refiners	$3.9109
November 1973	
Major Integrated Refiners	$5.3620
Total Independent Refiners	$5.6887
December 1973	
Major Integrated Refiners	$6.4828
Total Independent Refiners	$6.6736
January 1974	
Major Integrated Refiners	$7.2820
Total Independent Refiners	$8.1364
February 1974	
Major Integrated Refiners	$8.1677
Total Independent Refiners	$9.4748
March 1974	
Major Integrated Refiners	$8.4070
Total Independent Refiners	$9.6106
April 1974	
Major Integrated Refiners	$8.7247
Total Independent Refiners	$9.9125

May 1974	
Major Integrated Refiners	$9.1388
Total Independent Refiners	$10.0337
June 1974	
Major Integrated Refiners	$9.1717
Total Independent Refiners	$9.9688
July 1974	
Major Integrated Refiners	$9.0760
Total Independent Refiners	$9.9646
August 1974	
Major Integrated Refiners	$8.9579
Total Independent Refiners	$9.8224
September 1974	
Major Integrated Refiners	$8.9418
Total Independent Refiners	$9.7374

STIPULATION AND CONSENT ORDER

Filed March 15, 1976

[Caption Omitted in Printing]

The parties, by their undersigned counsel, this day of March, 1976, stipulate that they do not oppose the entry of an Order of this Honorable Court continuing the provisions of the Order of this Court entered May 5, 1975, a copy of which is attached hereto, pending the appeal of these proceedings, provided however, nothing contained herein is intended to be viewed as, or interpreted as, an admission by plaintiffs as to the merits of defendant's appeal from this Court's Final Judgement and Declaration and Order of January 27, 1976, or the Motion of Defendants To Stay The Judgment Of This Court Entered January 27, 1976.

/s/ JOHN A. WOODSTOCK,
Assistant Attorney General,
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Attorney for Plaintiff
Phillips Petroleum Company,

/s/ RICHARD A. REID,
ROYSTON, MUELLER, THOMAS
& MCLEAN,
Attorney for Plaintiffs
Petroleum Marketing
Corporation and
Commonwealth Oil
Refining Company, Inc.

/s/ FRED W. DROGULA,
GINSBURG, FELDMAN & BRESS,
Attorney for Plaintiff
Ashland Oil, Inc.

SO ORDERED

E. MACKELL CHILDS, Judge.

[Certificate of Service Omitted in Printing]

PROCEEDINGS

[T. 36] RICHARD T. HARVIN,
a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Richard T. Harvin, 1221 Clearfield Circle, Lutherville, Maryland.

DIRECT EXAMINATION

By Mr. Noonberg:

Q. Mr. Harvin, by whom are you employed? A. Exxon Company, U.S.A.

Q. And in what capacity, sir? A. Retail sales manager for the Eastern Marketing Region.

Q. By the way, what is the Eastern Marketing Region consist of? A. Consists of the states of Pennsylvania, Maryland, Delaware, the District of Columbia, Virginia, West Virginia, Ohio and parts of Kentucky.

Q. How long have you been employed by Exxon? A. Thirteen years.

Q. Could you give us your educational background, sir? [T.37] A. I finished Clemson University in 1962 with a B.S. degree in mechanical engineering.

Q. And after you graduated from Clemson, did you then go with Exxon? A. Yes, I did, in 1962.

Q. In what capacity did you go in Exxon? A. I joined Exxon after graduating from Clemson as an industrial sales trainee.

Q. And could you give us a brief synopsis of the various positions that you've held with Exxon and the responsibilities that they entailed? A. Since joining Exxon in 1962 as an industrial sales trainee and after completing a year of training, I was transferred to the Tampa, Florida district as an industrial salesman. That would have been in 1963 and after two years of working

in the capacity of developing the fuels and specialty markets for the company, I became a general sales representative with responsibility for the day-to-day counseling of both dealer operations and company employees. In 1967 I was transferred to the Charlotte, North Carolina district office as a sales supervisor and at that time I had the responsibility for supervising five sales representatives who had the responsibility for the day-to-day counseling activities [T.38] of both dealer operations and company employees. After that assignment I was transferred to the Southeastern Region Office, that would have been in 1968, in the financial and business analysis section. In that capacity I had the responsibility for developing sales and expense forecasts, the responsibility for evaluating the sales and expense results and also the responsibility for economic evaluation of various promotions and programs. In 1969 I was transferred to the Jacksonville, Florida district office as district manager and my responsibilities entailed the supervision of approximately twenty sales representatives, sales supervisors and district personnel. In that capacity I had the responsibility for sales, expenses, administrative responsibilities in personnel development. At that point the Jacksonville district covered the northern portion of Florida as well as the southern portion of Georgia. Later in 1969 I was assigned as operations coordinator in the Charlotte, North Carolina region office and I had the responsibility for the overall coordination, planning of the region's pipeline terminals. This would have been responsibility for supervising approximately a hundred and twenty-five people. In 1970 I was transferred back to Florida again as district manager in the Miami district which covered [T. 39] the southern portion of Georgia and the responsibilities entailed the same as those covered in my remarks about the Jacksonville, Florida district. In 1971 I was transferred to the Houston, Texas

headquarters office in our marketing services group and I had the responsibility for developing strategies, policies and guidelines for the retail service station chain throughout the nation. Later in 1971 I was transferred to our corporate planning department and had the responsibility there for developing a corporate long-range financial forecast as well as an industry long-range financial forecast. In 1972 I was transferred to the marketing distribution and engineering section as distribution coordinator with overall responsibility for the company's pipeline and waterfront terminals in terms of planning facilities, evaluating results and coordination of those activities. In January 1974 I was transferred to the Eastern Region Office as market development manager. In that capacity I had the responsibility for implementing the headquarters strategies, policies and programs as well as developing additional region strategies and programs. I had the responsibility for coordination of motor gasoline, motor oil, tires, batteries and automobile accessory markets and I had the responsibility for the supervision [T. 40] of the administrative group, the implementation of both the voluntary and mandatory allocation programs and the staff support, coordination of staff support for all of our retail activities which included company operated stores. In June of 1975 I became retail sales manager, the position I now hold. I have the direct line responsibility for five retail districts covering the States of Pennsylvania. most of Maryland and the State of Delaware.

Q. Mr. Harvin, are you familiar with Exxon's marketing practices in the State of Maryland? A. Yes, I am.

Q. And indeed are you familiar with Exxon's marketing practices throughout the country? A. Yes, I am.

Q. Mr. Harvin, what brand names, by the way, has Exxon marketed under in the State of Maryland? A. In Maryland we've marketed under the brand names of Esso and Exxon and Esso Standard. We began marketing

under the name Exxon in 1973 and in 1972 we established a secondary brand called Alert.

Q. Mr. Harvin, would you describe how Exxon markets gasoline to the – how it gets from Exxon to the consuming public? [T. 41] A. Exxon markets its gasoline in a lot of different ways in an effort to meet what we feel are the needs and desires of the consumer and there's a very wide range of consumer preferences in the marketplace ranging from those who will sacrifice all service and traditional amenities such as repair service for quick service and lower prices. To react to that consumer preference companies operate various types of stores ranging from full self-service stores, limited service stores and all the way to facilities which repair – provide extensive repairing service capabilities.

The trend in industry in recent years has been to multi-pump island stores with limited service. As far as Exxon is concerned we don't believe that there is a prototype of the consumer in the marketplace today and we believe there is a very wide range; and we try to monitor consumer preferences on a daily basis and try to design our services and our facilities so that we are in the position to meet this wide range of consumer preferences. This would mean that Exxon participates in full self-service, Exxon participates in limited service, Exxon participates in conventional stores and Exxon also has a car care center type store. The Exxon branded stores are what is commonly referred to [T. 42] in the industry as major brand stores although Exxon does operate private brand stores under the name Alert. The primary difference between the two is that major brand services usually advertise the brand, they usually accept credit cards, they usually provide repair and service capabilities and private brand stores usually just sell motor gasoline, motor oil without repair facilities and usually do not take credit cards.

Q. Mr. Harvin, in connection with pretrial stipulations

that the parties have entered into I think the record reflects that as of December 31, 1973 Exxon branded gasoline was sold at approximately twenty-five thousand four hundred outlets located in about I think it's forty-five states and the District of Columbia and that of those twenty-five thousand approximately nine hundred and thirty-three were operated with company personnel. Could you give us some idea of how that relates to the Maryland situation? A. I'd like to take the dealer operated stores first, if I may. Dealer operated stores can generally be divided into two categories. The first category is where Exxon either owns or leases the real estate and improvements and the second category in which Exxon has no ownership either of the real property or the improvements. [T. 43] This latter type is called contract dealers and in the former type where Exxon either leases or owns the land and facilities are called lessee dealers and these facilities are leased or sub-leased as the case may be to the dealers.

The – Exxon has approximately three hundred and fifty-six retail stores where Exxon owns the facilities and leases or sub-leases to the dealer.

Exxon in the State of Maryland has approximately one hundred and fifty contract dealers.

In addition to the dealer operation it has also been stated that Exxon is engaged operating some stores on a company basis and as I believe it has been agreed there are thirty-two Exxon branded company operations in the State of Maryland and four Alert brand stores in the State of Maryland. In a company operated store the store is operated by company employees. The company makes the decisions as to what products and services are provided to the consumer. The company makes the decision as to what prices are charged for these products and services; and the company makes the decision as to what days and hours of operations that these stores are operated.

Q. Mr. Harvin, can you give us some idea of the [T. 44] relative percentages of company operation versus dealer operation both in Maryland and nationally for Exxon? A. I believe at the end of July 1974 Exxon had approximately seven percent of its stores in the State of Maryland operated by company employees, slightly less than seven percent.

Q. What has been the historical trend of that percentage number in the State of Maryland? A. Both in the State of Maryland and the – and the country the percentage and the number of company operated stores has been declining in the last three to four years.

Q. Mr. Harvin, perhaps to illustrate this, I'd like to show you what has been identified as Exxon's Exhibit #1.

(Court) Any objection?

(Mr. Woodstock) I've already stipulated to the authenticity of the photographs.

(Court) All right.

(Black notebook of photographs filed herewith as Exxon's Plaintiffs' Exhibit No. 1)

Q. Mr. Harvin, would you using Exxon's Exhibit #1 identify for the court the various types of stations that are illustrated in that booklet, both dealer and company operated? [T. 45] A. The photograph numbered one represents a typical car care center facility which Exxon operates on a company basis in the State of Maryland. There are some eleven of these locations with investments running as high as nine hundred and twenty thousand dollars. I think the average initial investment is approximately four hundred thousand dollars. The car care centers have typically between seven and twelve service bays as opposed to conventional stores which have between two and four service bays. The car care center

concept requires that in addition to normal minor repair service and maintenance service offered at conventional stores that we also engage in major automobile service to the consumer.

The photograph numbered one in this case is a ten bay car care center located in the State of Maryland and operated on a company basis.

The photograph numbered two again is a Exxon car care center operated on a company basis in the State of Maryland. As you will note the – we also have facilities for gasoline service in addition to the repair and service capabilities at this particular location. You will also note and it's a little hard to see in the photograph that we are offering an innovation to the consumers at this particular lcoation, that is, one [T. 46] pump island is full service and one pump island is what we call express lane service where there is no driveway service and all the customer does, is comes in an attendant pumps the gasoline and the labor savings results in a lower price for the consumer.

If I could refer the court to photograph numbered three, I think this probably better illustrates the express lane concept that is used in conjunction with not only car care centers but all company operations in certain locations.

(Court) Three and one are the same, aren't they? A. It's the same location, yes, sir.

(Court) All right. A. Photograph number four I think probably better illustrates the service bays that are found in a typical car care center and similar type work that is performed in a car care center. As you can see this is a five bay – ten bay, excuse me, car care center and the services that are provided are brake service, wheel alignment, tune-ups, muffler work, power-trained transmission work and others.

Photograph number five illustrates some of the sophisticated and complicated testing equipment that's [T. 47] required in a car care center to complete – to properly perform the array of services offered to the consumer.

Photograph number six is a further illustration of some of the equipment that's contained in a car care center. I might add at this point that car care centers are in competition with mass merchandisers, department stores, specialty shops, tire stores and other people who specialize in automotive repair and service capabilities.

Photograph number seven illustrates a tire display which is in our customer lounge. I also would like to make a point that in addition to repair and service capabilities Exxon also engages in the retail sale of tires, batteries and automobile accessories.

Photograph number eight is a copy of the Exxon Company USA guaranty, this is a nationwide guaranty which is provided to the consumer for any work performed at the car care center. This work is guaranteed not only at the car care centers in the State of Maryland but the car care chain throughout the nation.

Q. Mr. Harvin, while you're on the subject of car care centers, are all the car care centers operated by Exxon in the State of Maryland on a company operated basis? A. Yes, they are. All car care centers in the [T. 48] State of Maryland as well as throughout the country are operated on a company basis.

Q. And why is that? A. We feel that in order to directly sponsor and control an investment that sometimes ranges up to nine hundred thousand to a million dollars it is necessary to operate the store on a company basis. We feel like that this is the only way to standardize performance standards and this is, of course, the only way that we can provide a guaranty to the consumer.

Q. Why don't you continue, Mr. Harvin? A. The photograph number nine is a self-service location in the State of Maryland operated by company employees. This facility is operated with one employee per shift and we are able to supervise a number of these locations with one field representative. This provides fast service for the consumer and the efficiency that has been manifested by one employee per shift and the supervision of multiple operations manifests itself in a lower price to the consumer in the State of Maryland.

To save the court some time, photographs number 10 and 11 are also illustrations of the same self-service store that was illustrated in photograph number 9.

If I may proceed then to photograph number twelve, [T. 49] this is a conventional store which is also operated by company employees and as far as Exxon is concerned, this is an extremely important link with the consumer. Through operation of these stores, we are able to monitor on a day-by-day basis the consumer preferences and how that may shift over a period of time.

The photograph number thirteen is also a conventional store with three bays operated by company personnel. This particular store is in conjunction with a car wash as you can see from the right hand corner of the photograph.

Photograph number fourteen is the same location as contained on photograph thirteen but I think it better illustrates one of the innovations that has been made possible by company operations and that is a self-service island. This particular store has one full-service island and one self-service island. This enables us to compete for that segment of the consumer population, those who are interested in fast service and lower price.

Photograph number fifteen is also another shot of the car wash that I spoke of previously. I might add that if

you will note the sign on the left hand side of the photograph again this is an innovation that has been tried at the company operated stores. This [T. 50] is a carry-out motor oil display and signing package. Things like this, functional innovations like this are tried at company operated stores and if proven successful then these are taken again to our dealer organizations for their consideration in use in their business.

Photograph number sixteen again illustrates the car wash which is in conjunction with this three-bay conventional store operated by company employees.

Photograph number seventeen is a typical three three-bay conventional store. This particular facility is participating in the carry-out motor oil. It is also participating in partial self service. So we have one full-service island here and one partial self-service island.

Photographs eighteen and nineteen merely illustrate the type of aftermarket business that we're in in company operated conventional stores. As you can see, we have gasoline availability. In this particular store we have full service on one island, self service on one island, we've in the carry-out motor oil business and we're selling tires and there are also some battery displays. In photograph nineteen you can see some of the tire displays.

In photograph twenty this illustrates the other [T. 51] automobile accessories that are being sold at company operated stores.

Photograph number twenty-one is merely a further illustration of tire displays and the fact that company operated stores are in the automobile aftermarket business also.

Photograph number twenty-two is a company operated store which is being operated by company employees in conjunction with a contract with the Maryland Transportation Authority on the Kennedy Expressway. This

facility is owned by the State of Maryland and operated by Exxon with company employees. We feel that in order to comply fully with our contract with the Maryland Transportation Authority that it is necessary to operate this store with company employees to insure pricing in accordance with the contract, service levels in accordance with the contract, as well as hours of operation.

Photograph number twenty-three is merely another shot of the Maryland – the store operated in conjunction with the Maryland Transportation Authority on the Kennedy Expressway; and this particular store serves both north and southbound customers. The store is open twenty-four hours a day and provides two service vehicles in compliance with the contract with the State [T. 52] of Maryland.

The photograph number twenty-four is an illustration of an Alert branded outlet. As I mentioned previously there are four Alert locations in the State of Maryland. The first was opened in 1972 in an effort to gauge the the potential of a private brand section of the market. These facilities sell gasoline and motor oil only. They do not have repair service capabilities. They do not accept credit cards and are designed to emulate the private brand operation of high volume, low overhead cost and lower prices.

Photograph number twenty-five is a two-bay facility with two pump islands for gasoline sales. This particular store is dealer operated and as you can see from this photograph, the dealer has some capability for minor service work, is also displaying tires and is involved in the aftermarket business.

Photograph number twenty-six is also a dealer operated store. This is a four-bay facility providing tire, battery accessory sales and some minor mechanical work. The

store is also involved in full-service and self-service gasoline facilities.

Photograph number twenty-seven is also a four-bay dealer operation located in the State of Maryland. [T. 53] This facility also has the capacity for selling gasoline, tires, batteries, accessories and some minor mechanical repairs.

Q. Would that be a typical major brand dealer operated station, Mr. Harvin? A. This would be a typical major brand dealer operated station.

In my remarks earlier I referred to the fact that Exxon had approximately one hundred and fifty contract dealers in the State of Maryland. In the photograph on – number twenty-eight is a typical contract dealer with facilities of a typical contract dealer. This is a case where the real estate is owned or leased by the dealer. We only have a supply contract with the dealer. This is a two-bay facility with gasoline capability as well as service capability.

The photograph number twenty-nine is again a contract dealer with an ancillary business. This particular contract dealer has gasoline facilities, he has some minor amount of service bay facilities and is also operated in conjunction as a parking garage.

Photograph number thirty again is a contract dealer, typical contract dealer. This facility provides gasoline service and also is operated in conjunction [T. 54] with a convenience food store.

While the book does not contain illustrations of reseller service stores, at this time there are approximately one hundred reseller service stores under the Exxon brand in the State of Maryland. Facilities are normally either conventional stores operated in conjunction with some ancillary business such as the convenience foods or parking garages, maybe even car washes.

Q. How does the reseller get his gasoline, Mr. Harvin? A. Reseller purchases gasoline, Exxon resellers would purchase their gasoline from Exxon and resell the product to their dealers.

Q. Mr. Harvin, I believe that you testified that in the State of Maryland Exxon has approximately ninety-four percent of its stations operated on the dealer basis. Does Exxon have any plans to change that percentage? A. No, we do not. In the thirteen years that I've been with the company we've always operated the predominant number of our stores on a dealer operated basis and we have no plans to change that position. We feel that dealers are the backbone of our business. Their right of enjoyment to their premises is honored by Exxon. [T. 55] We do not and have not terminated dealers for the sake of operating them – operating the store on a company operated basis and we don't plan to change that position in the future. While this is the case, we feel that it is extremely important that we be able to operate some of our stores on a company operated basis.

Q. Would you, Mr. Harvin, describe for Judge Childs what those reasons are why Exxon believes it's so important to operate some of its stations on a company operated basis? A. There are three general reasons why Exxon feels it's extremely important to operate some of its stores on a company operated basis. Those can be number one we feel that it's extremely important to Exxon to be able to directly monitor the customer preferences in the marketplace and these are evolutionary. They change from day to day and this is Exxon's link with the consumer in the marketplace. If we did not have company operated stores, we would be merely wholesalers and we would have to depend on secondary information as to the effectiveness of the Exxon retail offer in the marketplace.

Q. You indicated that there were – there were three reasons. You've indicated one. What are the other two? A. The second reason is that it's in Exxon's [T. 56] judgment that company operations enhance the dealer operations in particular and the marketplace in general. We believe that our participation in the full range of consumer preferences enhances the Exxon brand image both in the State of Maryland and nationwide and that the dealers benefit from that enhancement of the image.

The third reason is that Exxon makes a retail profit by operating stores on a company operated basis.

Q. What was that profit in the last fiscal year if you have information available, Mr. Harvin? A. In 1974 that was approximately seven hundred thousand dollars which Exxon enjoyed by operating stores on a retail basis that we would not have enjoyed by operating the stores on a dealer basis.

(Court) Where was this? A. Excuse me, sir, in the State of Maryland.

(Court) Oh. A. That would represent an approximate fifteen percent after tax return on those investments dedicated to operating at retail which are primarily inventory and equipment.

Q. From your vantage point as a Exxon representative are there other advantages to the consumer and to the independent dealers because of Exxon's operation of [T. 57] company operated stations? A. Yes, I think there are a lot of advantages.

Q. What are they, sir? A. Well, with company operations Exxon is able to experiment with merchandising ideas, with operating procedures, with financial controls and with various types equipment. We feel that we can only do this in a laboratory controlled condition and when these techniques are proven successful, then we

take them to our dealer organization and encourage their participation. Another very vivid example I think of innovations which the Exxon Company has been able to do through the operation of company stores is the car care center concept. Had we been unable to operate those stores on a company operated basis, we probably would not have developed car care centers in the State of Maryland and we certainly would not be able to provide the nationwide guaranty that we're doing. Another institutional innovation that's been developed through the operation of company stores is the partial self service. This was illustrated to the court in several of the photographs, this was a program that was tested in company operated stores two or three years ago and has proven successful and has now been introduced to dealers at no cost to the dealer. [T. 58] Exxon's cost in providing this is approximately seven hundred and fifty dollars per dealer store. The type things that were tested in conjunction with the partial self service program were what's the proper signing to signal the customer as he approaches the driveway that one island is full service and one island is partial self service; what's the best equipment to use; what's the best credit collection to use; should we use credit cards or partial self-service islands and more important than any of those I think is we're able to estimate for the dealer how much business he would be able to attract to his partial self-service islands.

Another very important, I think an extremely important way that company operated stores have been used is that in 1962 Exxon entered the Florida market. This was a market that we'd never been in prior to 1962. We were unknown in the market at that time. We had no brand image. We were unable to attract dealers. Stores were unable to provide sufficient income to the dealer so Exxon elected to operate those stores on a company operated basis until such time we could build a volume through

proper operation to the point that the dealer could make a living and at that time the stores were leased to dealers. This was done –

[T. 59] Q. What period of time did that encompass? A. This was some five or six years later. So that would have been in 1967, 1968.

Q. And what percentage of the stores that Exxon has in Florida are company operated and what percentage are dealer operated, if you know? A. I'm not sure of the exact percentage, sir, but I would think less than five percent are company operated at this time.

Another very important way that company operated stores are used is the introduction of the Alert brand in Maryland in 1972. As I've stated previously to the court, the purpose of that was to gauge the potential of the private brand sector of the market and we operate that store with company employees to be able to react quickly and to be able to directly monitor the results of that operation. Had we been prohibited from operating company stores in the State of Maryland in 1972, we would not have come into the market with Alert stores.

Another reason company stores are operated on a company basis is that in Exxon's judgment this is the most efficient way to operate the store and I would use a full self-service store to illustrate that point because we only have one employee per shift and we can supervise [T. 60] many stores with one field representative. Because of those reduced expenses, we're able to sell to the consumer at a lower price.

Other ways in which company operated stores are used and other benefits to the company operated stores are we use those facilities to train dealers and train company employees. We use those stores to assure continuity in operation. For example, if a dealer dies or

leaves suddenly, the store is operated on a temporay salary basis to provide some continuity for the customers of that store and to provide some continuity for the incoming dealer.

Another way that – important way that the company operated stores is used is that we, for example, have customer complaints and the dealer and the customer are unable to agree as to what the corrective remedy is, Exxon in some cases will redo the work at company operated stores to maintain that customer's patronage; and as I mentioned going through the book with the photographs, we also operate the one store on the Kennedy Expressway in conjunction with a contract that we have with the Maryland Transportation Authority.

Q. Thank you, Mr. Harvin.

Mr. Harvin, are you familiar with Chapter 854 [T. 61] of the Laws of Maryland 1974? A. Yes, I am.

Q. And have you reviewed Paragraphs B and C of that Act particularly? A. Yes, sir, I have.

Q. Focusing your attention on Paragraphs B and C of the Act, I'd like to ask you what effect, if any, you think the effectuation of those provisions would have on Exxon. I hand you a copy of the pretrial order which contains a copy of those provisions. A. In my opinion this would preclude Exxon from operating its stores on a retail basis in the State of Maryland. It would preclude Exxon from enjoying any retail profits on its company operated basis in the State of Maryland. It would preclude Exxon from being able to directly monitor the effectiveness of its retail offer in the State of Maryland and, therefore, may affect our long-range plans in the State of Maryland. It would also preclude Exxon from participating in the retail sale of tires, batteries, automobile accessories and repair and service work in the State of Maryland. Car care centers I can make that comment specifically to these type operations. As I mentioned earlier without

company operations Exxon would build no additional car [T. 62] care centers in the State of Maryland; and, if fact, I don't believe that Exxon could continue to provide the nationwide guaranty to consumers in the State of Maryland. We think that the statute precludes Exxon from getting a fair rate of return on its investment. If the law is upheld, in all probability we'll be able to lease some of the conventional stores in the State of Maryland to dealers. However, I would doubt that we would be able to get a fair rate of return on our car care center facility because of the complicated and sophisticated equipment that's required to provide the type services that are provided to the Maryland consumer. In the Alert operation because we are competing in the private brand segment of the market, it's extremely important that we practice with the private brand sector of the market and under the current anti-trust laws we would be precluded from having any assurance that that would continue if the Alert stores were leased to dealers in the State of Maryland.

Q. Thank you, Mr. Harvin.

Mr. Harvin, are you familiar with the provisions of Paragraph F of Chapter 854? A. Yes, sir, I am.

Q. Well, let me ask you one other question [T. 63] I – before I move on to that subject. You indicated that in your judgment you believed that Exxon would not be able to get I think you said fair – fair rental value out of some of the car care centers. Would you explain the basis of that statement? A. The investment in a car care center as I indicated earlier can range up to almost a million dollars and included in those facilities are a lot of very complicated and very sophisticated testing equipment that's needed to perform those service capabilities. I don't believe that we would be able to maintain those facilities and I don't believe that we would be able to attract people to give us the proper rate

of return (word unintelligible as someone slides microphone across the table) dealer operated.

Q. Are you familiar with the dealer operation that Exxon has in Maryland and throughout the eastern region at the present time? A. Yes, I am.

Q. Mr. Harvin, I hand you again this pretrial stipulation and direct your attention to Paragraph F of Chapter 854 of the Laws of Maryland 1974. Are you familiar with that provision? A. Yes, I am.

[T. 64] Q. Mr. Harvin, that relates to a allocation formula of some sort, does it not? A. Yes, sir.

Q. Could you briefly explain what the Exxon allocation formula has been? A. Motor gasoline, both in the State of Maryland and nationwide, is controlled by the Federal Government pursuant to the Emergency Petroleum Allocation Act of 1973. Since its inception Exxon has been in full compliance with the provisions of that Act and the regulations promulgated under that Act. Prior to the Act being passed, in June or July, excuse me, 1973 in response to a tightening supply situation and in a response from – request from government officials Exxon began voluntarily allocating motor gasoline. A system was developed which divided the available gasoline supplies by class of customer into each customer within that class on a fair and equitable basis and on the basis of historical sales. A monthly motor gasoline norm was developed for each customer on the basis of the prior two years experience plus an adjustment for recent trend. In December 1973 –

Q. Excuse me, before you leave that subject, Mr. Harvin, was in that formula, that voluntary formula, was there any distinction made between company operated [T. 65] stores and dealers operated stores? A. None at all. Both company operated stores and dealer operated stores were on the same basis.

Q. Please continue. A. In December 1973 Congress passed the Emergency Petroleum Allocation Act and and Exxon has been in compliance since that time. That was effective February 1974.

Q. Is that Act in force now; A. Yes, it is.

Q. Are you familiar with the federal allocation program? A. Yes, sir, I am.

Q. Are you familiar with Exxon's efforts to comply with that program? A. Yes, sir, I am.

Q. Are you able to state whether or not that federal program is in conflict with the requirements contained in Paragraph F of Chapter 854? A. In my opinion, it is in conflict.

Q. Could you briefly explain to the court the basis upon which that statement is made? A. The federal regulations contain provisions for hardships, contain provisions for redirectives, contain provisions for state set aside program and contain [T. 66] the provisions for priority in users. The Maryland provisions do not contain any of these four elements.

Q. Mr. Harvin, again directing your attention to Paragraph F of the Act, you see there a reference to periods of shortage. Do you determine – can you determine what a period of shortage is? A. No, sir, I cannot from the provisions.

Q. Have there been any regulations that you're aware of defining what a period of shortage is? A. No, there have not been.

Q. Who determines, Mr. Harvin, whether that shortage is a shortage in Baltimore City or the State of Maryland or the nation or some part thereof? A. I have no idea.

Q. And who determines whether or not that shortage is based upon an industry shortage or a shortage for some other reason such as because a refinery of Exxon's has

been disabled? A. I don't know. It's impossible to tell from the provisions of the Act.

(Mr. Noonberg) I have no further questions of Mr. Harvin.

CROSS EXAMINATION

BY MR. WOODSTOCK:

Q. Mr. Harvin, my name is John Woodstock, Assistant [T. 67] Attorney General for the State of Maryland. I believe you testified to the effect that the overall number of company operated service stations by Ex – operated by Exxon has reflected a trend of decrease, is that correct? A. That's correct, sir, since 1971.

Q. Since 1971. Is 1971 of any particular significance in this company operated program? A. No, it's not.

Q. How long has it been under way? A. Company operated stores, sir? In the thirteen years since I've been in the company, we've had company operated stores.

Q. Can you identify a Exxon employee by the name of L. G. Rawl, R A W L? A. Yes.

Q. Who is he? A. Mr. Rawl is a member of our management committee Exxon Company USA in Houston.

Q. Does he sit on the Board of Directors? A. No, he does not.

Q. Would you expand a little bit on what he does, what's his position requires him? A. Mr. Rawl is the contact member on the Management Committee for marketing, prior to that was vice president – [T. 68] vice president of marketing for Exxon Company USA.

Q. I show you a document that was provided the State in response to its discovery and ask you if you can possibly identify what the document pretends to indicate.

(Witness reading document to himself)

Q. Can you identify the document? A. This is a document of opening comments by Mr. L. G. Rawl, its a

method of operation presentation to whom it was made I cannot be certain.

Q. In your counsel's transferral of the document to me it was indicated that there is also a date on that document written up in the corner I believe. If you would read the date please, I'd appreciate it. A. The date is December 1971.

Q. Can you make out what else is written up there? A. Yes, it looks as though it may be a Board presentation.

Q. What – what board would that be? A. At that time this would have been the Exxon Board. I'm sorry, sir, that would have been the Board of Directors for Humble Oil and Refining Company in 1971.

Q. Okay. Would you do me a favor and maybe flip through some of the pages and I believe the presentation [T. 69] was of a particular type. I would like you to perhaps identify what type of presentation, whether or not there were props used or anything to that effect. A. It appears to me that there were Vu-graphs used in conjunction with the presentation and it looks as though the presentation contains what the current situation is in terms of company operated stores, a little bit about the past and what Mr. Rawl's opinion of what the future looked like.

* * *

[T. 70] (Court) Well, can't you read him the portions of the document wherein Mr. Rawl's testimony may differ with Mr. Harvin's testimony.

(Mr. Woodstock) That would be fine if the record can reflect the fact that the document is forty-eight pages long, that it was a presentation to the Board of Directors of the Humble Oil Company and that it deals with the marketing of company owned and operated service stations and it's directly related to his testimony as to

the decrease in the trend of the numbers of those company operated service stations. I would think that to maintain a full record providing three pages from a document that he's already identified as a vu-graph sheet might not have the impact and comport with the [T. 71] full nature of the document unless that whole document is in. The significance of the statements here that I'm going to question him about, I believe, is directly related and the impact of it is greater when you consider this was a presentation to "the" Board of Directors.

(Court) All right, the record can reflect that.

* * *

[T. 73] CROSS EXAMINATION (Continued)

BY MR. WOODSTOCK:

Q. Is it Mr. Harvin or– A. Yes, that's correct, Harvin.

Q. Mr. Harvin. Once again I give you this document. [T. 74] Did you read it over lunchtime? A. Yes, I did.

* * *

[T. 74] Q. After you read it, are you familiar with the contents now? A. Generally, yes.

Q. Sufficiently to describe to the court what's in the document? A. Yes, this appears to be a Board presentation made in December 1971. It was introduced by Mr. L. G. Rawl, who at that time was a member of the Humble Oil and Refining Company Board of Directors, the presentation itself, the primary nucleus of the presentation itself was made by our marketing vice president, Mr. Duvall Dickey, also Mr. Graham, our employer relations manager.

Q. In your capacity with Exxon, have you ever come in contact with the document? A. I have not read this particular document.

Q. Are you familiar with any of the policies contained within that document? [T. 75] A. I'm generally familiar with the policy concerning company operations, yes.

Q. Does that Document purport to reflect those general policies regarding company operation? A. The document reflects the general trend and the direction of the number of company operations, yes.

Q. Once again I believe you said in your direct testimony that the trend has been a decrease in the company operated stations, is that correct? A. That is correct and I cited since the early seventies.

* * *

[T. 77] Q. Mr. Harvin, would you please read verbatim that page? A. "This Vu-graph presents a profile of our company operated stores. The first column shows the profile of our present company operated chain at the end of the first ten months of 1971. At that time we had a total of thirty-one hundred and twenty-three company operated stores. The majority of these stores" and I'm sorry I can't read the number but it's a little over twenty-six hundred "were company operated conventional stores. Most of them were commission operated. Twenty-six hundred and eighteen. And some were operated on a planned salary basis, in parenthesis twenty-five.

At the end of ten months we had an additional three hundred and forty-two temporary company operations. This has been" – I'm sorry it did not Xerox, I assume that's consistent "for a number of months and is an acceptable level when we consider our historical experience. In the Alert chain we had one store open in October on a salaried basis.

The second column illustrates the three hundred and eighty conventional retail stores that we could operate on a company basis based on the pure breakeven economics [T. 78] presented on the previous Vu-graph.

Car care, grassroots self-service and tunnel car wash are projected to be operated on a company basis. The number of stores shown are consistent with our budget

forecast. On this basis, we would have about six hundred and fifty stores on the new company operation at the end of year one.

We would expect to maintain our present level of temporary company operations. Alert's growth is shown to be consistent with the present forecast.

The third column represents the profile of the proposed company operated chain at the end of year four. Several factors have been considered, the projected growth of conventional stores is primarily the result of new stores. Sixty percent meet profit criteria and in – are in markets where the plan will be implemented based on Houston MIP experience. Meeting the breakeven economic criteria" and in parenthesis "after the second year unprofitable stores are converted to dealer."

Q. Would you repeat that last part to me? What was in parenthesis? A. I didn't finish, sir. "After the second year unprofitable stores are converted to dealer dash thirty percent first year, ten percent thereafter.

[T. 79] All of our car care centers are projected to be operated on a company basis and their growth is consistent with our long range forecast. Through year two our grassroot self-service and tunnel car wash are projected to be totally company operated. In years three and four we're projecting that it will be desirable to convert some of these stores to a dealer operation, approximately fifty percent of the long range forecast.

In summary, based on the economic case, we expect to have twelve hundred and twelve stores on a compnay operated basis in year four plus the temporary operations in the Alert chain."

Q. Thank you. I'd like to ask you a few questions about the part in parenthesis where it said "After the second year unprofitable stores are converted to dealers." Does that mean it's an independent dealer? A. I would assume that would mean to an independent dealer, yes.

* * *

[T. 80] Q. Okay, does that particular statement that we've been discussing say that when Exxon finds a particular location that is company run does not show a profit that they will then go out and seek to fill that location with a dealer? A. Yes, however, I think you need to understand [T.81] that the economics are a little bit different.

Q. Well, I'm going to get into that now. Is it Exxon's position that a dealer could take that formerly company owned and operated location, run it and make a profit? A. In certain cases, yes, sir. In certain cases either if a dealer or Exxon could not make a profit, then the station is surplussed out of the chain.

Q. I noticed that fact is not mentioned in here. Can you give me an idea how many of those stations are factored out of the chain? A. Yes, sir, last year eight hundred and sixty-eight stores nationwide were surplussed out of the chain.

Q. How many unprofitable locations run by Exxon were turned over to dealers? A. Are you asking how many stores formerly operated by Exxon were turned over to dealers?

Q. Yeah, that were formerly identified as being unprofitable? A. I don't have the information concerning that. There were in 1974, I believe, around thirty-five, thirty-six stores that were converted from company operation to dealer, but I have no idea that these were unprofitable stores.

[T. 82] Q. Can you identify that page and identify for the court what that purports to say or what it reflects? Is it another Vu-graph sheet? A. It is another Vu-graph sheet, yes.

Q. Would you please read it? A. The Vu-graph is en-

titled "Company Operations Number of Stores." "The case is illustrated on this Vu-graph.

In order to institute the company operations in the desirable markets, we propose to operate six hundred and seventy-seven conventional retail stores in year one compared to three hundred and eighty conventional stores in the economic case. Two hundred and ninety-seven additional stores presents us with a much more attractive operating base. We can effectively institute the program in thirty-nine of our present districts. Additionally this strategy is economically attractive when we consider the influence of proper retail practices on our wholesale and downstream profits.

In year one all of the two hundred and ninety-seven stores would be projected to generate volumes in excess of fifty thousand gallons per month. They average approximately fifty-four thousand gallons per month today.

[T. 83] As new conventional stores are brought on stream in years one and two, those stores which did not generate a retail profit will be converted to dealer operations. The net effect of this program will be to hold the number of conventional stores constant through the first four years of the program. At that time, our chain of conventional stores would be on a pure economic basis as previously reviewed.

The remainder of the chain is consistent with the previous economic case.

In this case, we would have nine hundred and forty-six stores by the end of year one plus the temporary Alert stores. This is our recommended strategy for implementing the new method of company operations."

Q. I'd like to discuss what the fourth paragraph, fourth full paragraph on that page says. "As new conventional stores are brought on stream in years one and two, those stores which do not generate a retail profit will be

converted to dealer operations." That's all – I'm assuming that what the document says purports to be the truth, is that – am I correct in that assumption? A. I would assume so, yes, by reading the document.

Q. Mr. Dickey, I believe he made the presentation? A. Yes.

[T. 84] Q. He's a pretty respected man? A. Yes.

Q. He is. Name's on all the letterheads I believe.

"The net effect of this program will be to hold the number of conventional stores constant through the first four years of the program." Now I may be wrong, but it appears to me that Exxon is starting off with a large number, for a period of time they operate them. They then come to the conclusion whether or not they can turn a profit at the lcoation. After a certain period of time, they factor in not getting rid of the location but getting rid of it to a dealer; thereby keeping the number constant, it never is going to inflate because they keep adding new ones, weeding out bad ones. Am I right in that interpretation or am I drastically wrong? A. I can't – I can't –

Q. I'm talking about mathematics. Mathematics now. A. I can't agree with that. You've made the assumption that most of the stations, in fact I think you said all of the stations which were deemed to be unprofitable for Exxon were converted to dealer and that's not the case.

Q. I didn't make the assumption. I'm asking you [T. 85] to explain the statement here made without qualification in a presentation to the Board of Directors of Exxon Corporation that quote "As new conventional stores are brought on stream in years one and two, those stores which do not generate a retail profit will be converted to dealer operations."

(Mr. Noonberg) Objection. Your Honor, counsel has totally mischaracterized the document. If he has read the

document, he will see that it presents three alternative strategies to the Board. No one of which has either been – as far as the testimony here is concerned implemented whether page 16 or whatever page Mr. Woodstock had Mr. Harvin read has been implemented or whether in fact it was accepted by the Board, we don't know. All we do know is that Mr. Harvin read it.

(Mr. Woodstock) Your Honor, for that – on the same basis, we don't know whether the Exxon Board of Directors has approved every single activity that Mr. Harvin has testified to. Now I am willing and I propose to submit the entire document for the court's review. What I'm saying is the man was put on the stand by Exxon to testify as to Exxon's company operations and here's a document whereby –

(Court) But these are proposals, [T. 86] Mr. Woodstock, and I don't think you can use a proposal as an out and out basis of operation.

(Mr. Woodstock) I believe the witness' testimony was that this man – this does reflect company operations policy of Exxon. That's why we had him read it at lunch time.

(Court) Does it reflect it now is what I'm intersted in knowing.

(Mr. Woodstock) The document was projected –

(Court) See, I haven't read it at all and I'm hoping I can read as little of it as possible in view of all that business over on the stand over there, but if it's been put into operation, then I think it might be pertinent, but if it's just various proposals which the Board is to act on and decide whether to go along with one proposal or the other, I think it's immaterial.

Q. Mr. Harvin –

(Mr. Woodstock) May I –

(Court) Yes, go ahead.

(Mr. Woodstock) – see if we can clarify the materiality.

Q. Mr. Harvin, are the numbers that you read company owned and operated stations, those figures contained in this document –

[T. 87] (Mr. Noonberg) Which figures are you referring to?

(Mr. Woodstock) The total number of company operated stations as of 1973 the witness testified he was in charge of these things and has knowledge of them.

Q. Are they reflective of what the situation was number one in 1971 to your knowledge? Number two; in projected years one and two –

(Mr. Noonberg) Mr. Woodstock –

Q. –would bring us to 1973.

(Mr. Noonberg) I would just like –

(Court) No, sir, no, sir. That – That's not the question before the house. We have already stipulated, if I am not mistaken, as to in the pretrial order the numbers of the operating stations not only in Exxon but all of them. Now if you want to bring in some testimony as to what the present policy is, not what the proposal, but what the policy is of Exxon, I think it's pertinent; but to have two or three people make presentations before a Board of Directors and then saddle Exxon with what they proposed rather than what the Board did, I think is just completely off the beaten path.

(Mr. Woodstock) If this witness is not able [T. 88] to testify as to what the Board of Directors and the people in Houston do –

(Court) He's never been asked that.

(Mr. Woodstock) I've asked him if he could testify.

(Court) All right, ask him again, I didn't hear the question.

(Mr. Woodstock) – as to the validity of that document.

Q. Mr. Harvin, you previously testified as to the number of company operations currently in effect by Exxon in Maryland as well as the United States, is that correct? A. That is correct, sir.

Q. Are you familiar with the policy utilized by Exxon to arrive at that figure? A. The policy of Exxon is to – is currently and has been not to terminate dealers to put stores on company operation.

Q. I am talking about the internal decisions made by Exxon Corporation as to how they arrive at the total number of company run shops. Are you familiar with that information? A. I have not been involved in that discussion, no.

Q. At all? [T.89] A. Not at all.

Q. Never? A. Never.

Q. Not for the State of Maryland? A. The State of Maryland, I have some jurisdiction over the number of company operations in the State of Maryland, yes.

Q. Does your familiarity with the situation in Maryland go back to perhaps 1971, '72 or '73? A. I came into the State of Maryland in January 1974.

Q. In 1974. How many car care centers are there in the State of Maryland presently? A. Eleven.

Q. How does that compare with the total in the United States? A. I'm not sure of the exact number in the United States, I think there are approximately a hundred and thirty-five.

Q. I believe the number was a little bit lower. I believe it was a hundred and twenty-three major service centers nationwide which operate under the logo car care center and has seventy-four full service stations nationwide, Footnote 3 to Particular of Facts to Exxon Corporation, the Pretrial Order page 5, so do you change [T. 90] your testimony as of July 1, 1974 – would it be your testimony that Exxon had a hundred and twenty-three car care centers?

(Mr. Noonberg) Well, we have a stipulation to that effect, Your Honor, No dispute about that.

Q. Is there any particular reason why the little State of Maryland would have approximately ten percent of the total Exxon car care centers in the nation? A. This, Maryland market represents an extremely – extremely good market for Exxon and this is a market where we have good brand acceptance and this was one of the intitial car care center markets because of that reason.

Q. Was the car care center in fact tested in Maryland? A. This was one of the test markets, yes.

Q. I'd like to switch to the Alert brand. A. Yes, sir.

Q. How many stations, Alert stations do we have in Maryland as of today? A. Four.

Q. Four? A. Four.

Q. Do they sell Exxon gasoline? A. No, they do not.

Q. What gasoline do they sell at the Alert station? [T. 91] A. They sell Alert gasoline.

Q. And from where is that obtained? A. Alert gasoline is obtained on exchange.

Q. From whom? A. Currently from BP.

Q. Six months ago? A. I believe from BP. I have no exact knowledge on the Alert operation because I'm not responsible for the operation of the Alert stores in the State of Maryland.

Q. I believe you testified regarding the specialized equipment found in the Exxon car care centers. If you would, I'd like to ask you a few questions about the list of specialized equipment. Before we go into the list, let me ask you as part of your position with Exxon are you familiar with retail service station operations? A. In the State of Maryland, sir?

Q. I don't care, anywhere. A. Yes.

Q. When's the last time you've been inside a service station? A. I believe that was last Thursday.

Q. Item number one a Start-a-Car Unit. Would you

describe for me please what that exactly is? A. I believe this is a battery unit which is capable [T. 92] of starting the car when the battery goes bad.

Q. That – that's, if I'm correct in my description, is a battery that some people push on a hand truck and it has some wires coming out with two clamps that you put on the other person's battery and starts the car, is that correct? A jump starter or jump, right? A. That's generally the purpose that it serves, yes.

Q. Or a hot shot, I think it's sometimes called. Now would it be your testimony that this type of Start-a-Car Unit is a specialized equipment found in Exxon car care centers and is unique to that type of operation? A. No, sir.

Q. Would it be your testimony that that type of equipment is found just about in any retail service station? A. Generally the Start-a-Car Unit is found in retail service stations with service capabilities and repair service capabilities.

Q. Isn't it a fact that if I had a battery in my garage with jumper cables that I would qualify to consider myself as having a Start-a-Car Unit? A. I suppose if you could start a car with a battery and a series of jumper cables.

Q. Number two, a fuel pump tester, What is that? A. I'm not complete familiar with what a fuel [T. 93] pump tester is.

Q. I submit to you that's a compression gauge which anyone could buy in a hardware store or a motor parts center for about two dollars and ninety-eight cents.

(Mr. Noonberg) Objection, the witness stated he's not familiar with it.

(Court) Sustain the objection.

Q. What's a brake shop combination? A. I'm not completely familiar with a brake shop combination. I can – I can assume that this is a combination lathe, bearing press and all the other equipment needed to repair, grind and replace brakes.

Q. You're assuming but you don't know, is that your testimony? A. Mr. Woodstock, I don't get involved with the day-to-day details so there would be some equipment on the page which I would not be absolutely familiar with.

Q. You're not familiar with the day-to-day details. I believe you previously testified that the purpose of company run operations is to be able to gauge the acceptance of certain products and services by the company owned and operated stations. How, may I ask you, can you determine that if you're not familiar with the equipment itself and what it's supposed to do?

[T. 94] (Mr. Noonberg) Objection, it's a mischaracterization of the witness' testimony, Your Honor.

(Court) Sustain the objection.

Q. Number six, an acetylene gas welding unit. What is that? A. This is a unit powered by acetylene that's used for welding purposes.

Q. Number seven is basically the same thing, isn't it, it's an ARC welding set? A. Yes.

Q. Number eleven, parts cleaner-air operated. A. I'm sorry, what was –

Q. Number eleven. A. I'm not familiar with that piece of equipment.

Q. How about number fifteen? A. I'm not completely familiar with that piece of equipment.

Q. What does it purport to be, sir? A. A brake stool.

Q. It's a stool, isn't it? A. Yes.

Q. That people sit on? A. I would assume so.

(Mr. Noonberg) Objection.

[T. 95] (Court) In this case, that brakes sit on it, I suppose.

Q. Number twenty-one, an inspection mirror. Are you familiar with what an inspection mirror is? A. No, I'm not.

Q. A headlight tester? Are you familiar with what a headlight tester is? A. Yes.

Q. Have you ever seen them in any other gasoline station? A. I've seen it in some service stations with repair capabilities.

Q. Now you have knowledge of what the competition is out there for Exxon, am I correct in assuming that? A. I have a general knowledge of what the competition is, yes.

Q. Would you say that – would it be your testimony that out of these twenty-five items listed that at least eighty percent or more is standard equipment in any mechanical shop? A. I have no way of knowing that, Mr. Woodstock.

Q. Let me ask you about monitoring sales and types of gasoline and oil. How does the typical dealer-lessee pay his rent to Exxon? [T. 96] A. Rent is collected in a number of ways. The rents that Exxon collects represents the income potential of the store to the dealer. Sometimes this is collected on a gallonage basis for ease of collection. Sometimes on a flat basis.

Q. Do most Exxon dealers one way or another for whatever reason report their gallonage sales to Exxon? A. We have a record of the product purchased from Exxon, yes.

Q. In other words they report their sales of regular gasoline, is that correct? A. They do not report their sales.

Q. Excuse me, then if a man is paying his rent on a per gallon basis. A. This is per gallon purchase from Exxon.

Q. Okay, per gallon purchase –

(Court) Excuse me, Mr. Harvin, you've a little too close to the microphone. A. Sorry, sir.

(Court) And I think that's causing the problem.

Q. So Exxon does have direct information as to how many gallons of each grade of gasoline each dealer would be purchasing, is that correct? [T. 97] A. Mr. Woodstock, we deliver the gasoline to the dealer, so the answer is yes.

Q. Would it be fair to say then that Exxon would know what the current demand would be for the various grades of gasoline just by reviewing what they're selling? A. Yes, we – we determine what the current demand is by grade ratio based on what the dealers buy from us.

Q. Isn't that true with motor oil, also? A. Yes.

Q. And lubricants? A. Yes.

Q. To a certain – A. To a lesser extent with lubricants.

Q. And to a certain extent, TBA? A. No.

Q. You have no records of what dealers buy as far as TBA is concerned? A. We have records of what the dealers buy from Exxon, sir.

Q. Right. It is safe to say that gives you an estimate as to what the market is demanding, is that correct? A. I think this is a rather-rather poor estimate when it comes to TBA.

Q. Not TBA, I'm talking about now primarily gasoline [T. 98] and motor oil. A. Yes, this gives us a good estimate of what the Exxon stores are selling.

* * *

[T. 103] A. Our retail profits are calculated on the same basis, that is, we take the retail price of gasoline less the dealer tank wagon price of gasoline and that is our retail margin on a gallon of gasoline.

Q. You utilize the dealer tank wagon figure on your own company owned and operated stations for the purposes of calculating profit and loss? A. Yes.

Q. One more thing, in your direct testimony I believe you gave three primary reasons for Exxon to have company operated stations. The second one I believe was company operations enhance the dealer operation in

general. I wonder if you could explain that in a little more detail how that is supposed to work. A. The thought behind that statement, Mr. Woodstock, was that as you recall earlier I said that Exxon participates in what it believes are the total market segmentation, that is the full span of consumer preferences and this ranges from full service all the way through the car care; and in our judgment there is some synergistic effect and which is passed on to the Exxon dealer in terms of image that's built on a particular marketplace by serving all the needs of the consumer. The consumer can come to an Exxon branded [T. 104] or an Alert store for just about all of his automotive needs.

Q. Prior to the implementation of Exxon company owned and operated facilities, did Exxon engage in monitoring customer preferences for their products? A. Ah, Mr. Woodstock, to some degree Exxon's been involved in company operations since 1924.

Q. That didn't answer my question. A. Ah, we have no direct ability. We have no face-to-face contact when a customer is dealing through a dealer operated store. This is the reason we think it is very important so we get some feel for what the consumer is thinking and what his preferences are by operating some stores on a company operated basis.

Q. Okay, I believe you testified you are familiar with the competitors out there of Exxon, is that correct? A. I don't recall the specific statement. I have a general feel for what the marketplace is in Maryland, yes.

Q. Are you familiar with the various actors in this marketplace? A. To some degree, yes, sir.

Q. Would you – would it be your testimony that Exxon was the actor that initiated the concept of self service? A. No, sir, it would not be.

[T. 105] Q. Do you know who did? A. I'm not sure

who did in the State of Maryland. I think that the concept generally was used first by the private brand sector of the market.

Q. Is it still used by the private sector of the market? A. To some degree, yes.

Q. How about the gas oil facility? Was Exxon the first to introduce that type of marketing? A. Ah –

Q. They do have one in Maryland. It's up where I live. A. Was Exxon the first to introduce –

Q. Yes. A. – that concept? I don't know.

Q. I believe you testified on direct that in 1972 if we couldn't operate Alert ourselves, we would not have entered the Maryland market, is that correct? A. Ah, yes.

Q. How do you know that? A. There are anti-trust laws which would prohibit Exxon from being able to control the price of gasoline and the success of the Alert operation depends upon that store being price competitive with the private brand sector of the [T. 106] market. It was a test at that time and if we could not have had a controlled test, we would not have initiated the test at all.

Q. The anti-trust laws prohibit you from setting the price, those antitrust laws still exist today. I don't understand your statement. A. I'm sorry, I thought you were referring to the dealer operation.

Q. I'm talking about in 1972 if we couldn't operate Alert ourselves, we wouldn't have entered the Maryland market. I believe that's what you said on direct, I asked you how you know that. Was the Board of Directors of Exxon voted on that? A. Not to my knowledge.

Q. Then you had no basis for the testimony, did you? It was your opinion.

(Mr. Noonberg) Objection.

(Court) Well, he can say whether he had basis or not.

A. That – that is my opinion, ah, based on what I

know are the both federal and anti-trust pricing laws when we're dealing –

Q. I'm interested in knowing what you know about Exxon's corporate decision regarding the marketing of a [T. 107] secondary brand under the title Alert. You made a positive statement that you wouldn't have come in in 1972 if you couldn't direct operate. I'm asking you did you have any basis of first hand knowledge that that was a decision made by Exxon Corporation. A. I have no firsthand knowledge but I believe that would have been the decision.

Q. Exxon's voluntary allocation formula, can you tell me when that was implemented. A. It was implemented in July, 1973.

Q. And would you just run me through again, if you please, how that system was established? What went into it? A. Okay, first we took the available supply. Then that available supply was divided between class of customers based on historical division and then each customer within the class, ah, the gasoline allocation formula took two years of historical prior years sales or purchases from Exxon as the case may be and adjusted that for recent trends to reflect things like opening of new roads, changes in demographic data, et cetera. So each customer then was assigned an allocation volume for each month while we were under voluntary allocation. There was no difference in the system between dealer operated stores and company operated stores.

[T. 108] Q. I believe you characterized it in your direct examination as being a – performed on a fair and equitable basis. A. Yes.

Q. So it's your testimony that by factoring in two years of historical sales making the adjustments based on demographic changes and these other things that you've just mentioned that that constitutes fair and

equitable basis? A. Ah, that's – that's not what I said, sir. I said that it was adjusted for recent trends for such things.

Q. But that constitutes a fair and equitable basis in your opinion? A. In my opinion, yes, sir.

Q. What happens with a location that doesn't have a two year historical history? A. Ah, just taking an example of a new location, whether it be dealer operated or company operated, which did not have a historical base, we book calculated what a historical base would be. Now let me give you an idea about that. Let's suppose a station opened in June, 1972 which would indicate that the store had no full record for 1972. Then we would have used seasonals based on the actual purchases of that station to calculate what the [T. 109] first six months' experience would be and that some methodology was used no matter whether the store was operated on company basis or whether the store was operated on a dealer basis.

Q. Granted that, did it take into consideration ideal weather conditions? A. No, it did not.

Q. Assume if you will particular station in 1971 or '72 whenever Agnes hit us, that his gallonage dropped off during that particular month which would affect the quarter and his seasonal sales, if he didn't bring that up to Exxon, was that considered one of the factorings, factoring-ins to adjust his volume? Or his allocation, excuse me. A. Depending on when that – that set of circumstances was. If it was in the time frame that was used to adjust for recent trends, yes, that would have been recognized.

Q. I think Agnes was here during that period. A. I don't know.

Q. Aside from that, is it your testimony then that Exxon had firsthand information as to every change affecting every station such as road repair, broken water mains, grand openings of new supermarkets two blocks

away , everything that would perhaps contribute to an increase or decrease in gallonage on a sporadic basis? [T. 110] A. That's not what I'm indicating at all.

Q. Explain to me again if you will what the factors are that they're factoring in to making these adjustments to the historical base figure. A. I don't remember precisely what period of time was used in making adjustments, but let's suppose the years were 1971, 1972. Then we took the last six months of experience and factored it on that basis, not looking at each station individually but looking at what the prior, the most recent history had been on that station.

Q. Okay, a new location comes on – on stream, it's a car care center or company owned and operated facility. Do most of those have as part of the development and the location a projected volume? A. Yes, they do.

Q. And how is that figure arrived at? A. Ah, this is a model that's been developed by Exxon over a number of years which is based on traffic counts, based on demographic data would estimate what that store is capable of doing in terms of motor gasoline volume.

Q. Would that figure include the same considerations as those that we were just speaking about in establishing voluntary allocation amounts to those existing stations? A. If your question is was that volume predictor [T. 111] used, it was used in some cases where the store was new and we didn't have any prior experiences, yes.

Q. And he was given a percentage of that projection or was he given a hundred percent of it? A. Well, the supply factor itself varied over the period where Exxon was on voluntary allocation.

Q. Varied – A. But the same percentage was given all customers.

* * *

[T. 112] REDIRECT EXAMINATION

BY MR. NOONBERG:

Q. Just a couple questions, Mr. Harvin. You used the term surplussed out of the system. Would you just explain what the term means? A. This is divestment of uneconomical stations, stations that are uneconomical to the dealer and also to Exxon.

Q. You indicated that Exxon had one self service station in the State of Maryland, is that correct? A. Yes, sir, that's correct.

Q. Did – does Exxon have plans for additional self service stations? A. We would like to have additional self service stations in Maryland, but because of the uncertainty of the statute, we have not made any moves in that direction at all.

(Mr. Noonberg) No further questions.

(T. 118) JACK WILLIAM CHANDLER.

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Jack William Chandler, 1221 East Main Street, Chattanooga, Tennessee.

DIRECT EXAMINATION

By Mr. Preston:

Q. Mr. Chandler, you are the President of the Kayo Oil Company, is that correct? A. That's correct.

Q. How long have you held the office of president of Kayo, sir? A. Well, I've been president of Kayo since 1965, ten years.

Q. I would like, if I may, to go back in your own history and for you briefly to tell the court of your education, background and your employment experience before you went with either Kayo or its predecessor company, Kendall. A. Well, I'm a native of Chattanooga, Tennessee, attended the Chattanooga schools; attended the University of Tennessee at Chattanooga, was a business administration major, after leaving school I went to work for the Tennessee Valley Authority in the maps and surveys division as a cartographic engineer aide. At the advent of World War II, (T. 119) I got an appointment as an aviation cadet and was a pilot, flight instructor with the U.S. Air Force for five years, retired from the Reserve with a rank of major. After World War II, I did not return to the Tennessee Valley Authority but went to work for the Hotpoint Appliance Company as the general manager of distributorship of the eastern part of the State of Tennessee. I stayed with them for about eight years and I had known Mr. Kendall through his son, Paul. He was also in the Air Force and we had both of us been Chattanooga neighbors. Mr. Kendall had embarked

on a rather rapid—had began to embark on a rapid expansion program in 1955. At that time he had, well, I think ninety-nine service stations in about five states.

Q. Did you—tell the court when you—you went with Kendall in what year? A. In August of 1955.

Q. All right, sir, proceed. A. Which is twenty years ago.

Q. All right. A. I went to work for Mr. Kendall and his son, Paul, and my duties at that time were, well, many. I, of course, was a pilot. We had acquired a twin engine airplane. Paul Kendall, his son, was also a pilot. He flew. We, ah, I'd say embarked on an expansion program. My duties then were (T. 120) to look for real estate locations, to get permits to build, to supervise construction of the stations, to see that they were built, to plan sales promotions, to operate and staff them. In the meantime I sold airplanes because we had a aircraft dealership.

Q. How long did the aircraft dealership last? A. Oh, about three years until we got about four or five planes, two of them wholesale. The point I'm making is we all wore many hats. We didn't just do any one specific thing.

Q. Let me interrupt you if I may. By 1959 when Continental acquired Kayo, what were your duties at that time? A. Well, by that time we had—we'd gone from about ninety-nine stations up to about a hundred and sixty and the company had been divided up into two geographic, we call them divisions. Well, I was one of the division managers along with one of the older employees who is now executive vice president.

Q. And now that you have become the President of Kayo for the past ten years, describe to the court during the past ten years what your general duties have been as president? A. Well, of course, as president, of course, my—I (T. 121) have full responsibility as chief executive

officer, all the policies, plans, programs, all phases of the operation, pricing.

Q. Are you thoroughly familiar with Kayo's marketing practices throughout the country? A. Absolutely.

Q. And do you feel that by virtue of your background in the industry that you are familiar with the marketing of petroleum products retail generally throughout the country? A. Generally, certainly with respect to the private brand segment.

Q. When was Kendall Oil Company founded? A. Well, as you stated in your opening remarks, it was founded in 1940. Mr. Kendall was a Pure Oil jobber and at that time he even then could foresee that there was a need in the marketplace for another method for the motoring public to buy gasoline. So he branched out into a low price—as a low price marketer.

Q. Did he always use the name Kayo? A. Just for a brief time he used the word Grayhound but then he went to the word Kayo, which, of course, is a phonic sound of the initials K period O period. It was like Esso then. So I would say in about 1942 he took the (T. 122) brand name Kayo. At that time he only had five or six stations. It would be interesting to note Mr. Kendall was one of the real pioneers and innovators in this. Back then you didn't have highway trans—gasoline transports. All gasoline was transported from refineries in railroad tank cars and there were some stations especially our home office where we are right now located in Chattanooga which is on a spur track. They would get a gasoline—a tank car, a railroad tank car, the railroad would deliver to the siding where it was sometimes connected up actually to a pump, like it went direct from a tank car direct into the tank of the consumer. That's where you get the name of spur which is one of the recognized leaders in the private brand and it's a trackside tank car and so on; but even

then it showed that Mr. Kendall had the foresight to operate a discounted private brand operation.

Q. During the history of the Kendall Oil Company before it was acquired by Continental in 1959, did it ever have any dealer stations? A. Never, never.

Q. All stations then have always been—A. Always been—

Q. —operated on what basis? A. Fully controlled which is really absolutely (T. 123) necess—absolute necessity.

Q. We will come to that in a moment, but just to take us right up to the present time, how many stations does Kayo have at this time? Nationally? A. Well, nationally we have six hundred and ten. They are based east of the Mississippi River, but not including the New England states. We're in eighteen states.

Q. How many employees does Kayo employ nationally? A. Total approximately three thousand.

Q. Do you know approximately what the national sales are in dollars and gallons of gasoline for Kayo? A. Oh, approximately in dollars we're over—gross sales are over two hundred million annually and volume would be somewhat over four hundred and fifty million gallons.

Q. And all of those stations, all sixteen hundred—six hundred and ten are operated, company operated, is that correct? A. That's correct, all company operated, fully controlled.

Q. What type of a marketer of gasoline is Kayo Oil Company, that is, Mr. Noonberg in his opening identified private brand marketers, major brand marketers. Would you identify within what segment of the market you operate? (T. 124) A. Kayo is a private brand or is referred to as low cost, low price, private brand, opposite of Exxon.

Q. Does Kayo operate on its own any terminals, any refineries or have any production capacity? A. Kayo has no production, refining, transports. They do no blending, compounding or anything with any of the products.

Q. I'd like, Mr. Chandler, referring on your experience in the industry, if you would tell Judge Childs for the record here just what a private brand dealer and marketer of gasoline is, how they operate and—

(Mr. Woodstock) Objection.

Q. And in doing this distinguish them from a major brand marketer.

(Mr. Woodstock) Objection, Your Honor, I—

(Court) What's the objection, Mr.—

(Mr. Woodstock) The objection is I think he can characterize the Kayo method of operation but certainly not all private brand dealers which is what the question implies in his seeking an answer to it.

(Court) Well, he says that he's a private brand marketer so I suppose if he goes ahead and describes what he does that will take care of it.

Q. Go ahead, Mr.— (T. 125) A. Well, the private brand operation, of course, is as been stated in the opening remark—

Q. I want you to do this distinguishing your kind of station, the Kayo station, from the major brand station. A. All right. Private brand station as you drive up to it, you see probably a large price sign, in some cases you don't even see a brand name. The brand name is not important. The price is important. You go into—you drive in in most cases it is a secondary location as far as cost or the major brand station usually is a prime location, corner sites, first off the interstates and so forth. The private brand operators usually go for the middle of the block, for example, or maybe half a mile or so, a secondary off the interstates. When you go into a

private brand operation such as Kayo you have no service bays or facilities for mechanical work, only—use a limited amount of space on a driveway, pumps and probably an attendant there with a changer on his belt or someone to take the change. You contrast that with the major brand marketer you have, of course, the full service as also been numerated, the credit cards, which private branders generally do not have.

Q. Do you have any kind—does Kayo have any kind of credit? (T. 126) A. No.

Q. Cash only at all stations? A. Cash only.

Q. All right, sir. Go ahead. A. You have a brand acceptance surely in the majors, major stations. You have a higher level of employee and I don't mean to downgrade the private brand.

Q. On employees, Mr. Chandler, tell the court both from a standpoint of the number of employees and the type of employees, that is, both quantity and quality of employees, the kind of employees that Kayo both in number and type employees as opposed to the major brand station. A. Well, we have an average of about four employees per station, these employees require no special training. They can be—as long as they've got average intelligence, there isn't any specialty—special experience required and I would contrast that with the fact that major brand station as I see it you'd have to have a much higher level or skill of employee.

Q. Insofar as the number of employees, how many employees do you have to have in a Kayo station for any one shift related to number of gallons and explain that. A. Well, you generally can expect to have—naturally you've got to have one person per shift. In a higher (T. 127) volume station, there are occasions where you would need two employees per shift. Generally anything

over fifty thousand gallons per month, the station over fifty thousand gallons per month, would require two stations per shift—two employees per shift, excuse me.

Q. How does that compare with the number of employees that are required in major brand full service stations? A. Well, I would imagine it would be considerably less since they would have to have people to perform all these services we've mentioned.

Q. When you go—when the customer comes into the station, the Kayo station, other than get gasoline, does the attendant do anything else besides put gas in the car? A. No, no, that's all.

Q. Since most—since all of us go into stations from time to time, do they raise the hood and wipe the windshields and mirrors? A. Well, if you ask them, they probably would, but we don't have facilities for changing oil. You could add on the oil but we really discourage that because this is a fast in, fast out operation. If a customer wanted that kind of service, I think he'd go to a major brand station.

Q. Do you, for instance, offer road maps? A. No.

(T. 128) Q. Do you sell tires, batteries and accessories? A. No.

Q. Do you sell any product other than gasoline in your stations? If there are any related to the automobile, tell us what they are. A. Well, of course, we sell automatic transmission fluid, brake fluid, STP, for example, but this is strictly carry out or add on or the customer can get this at a Kayo station, he can take it or leave it. We don't push it.

Q. What kind of hours is a Kayo station, private brand station, open as compared to the hours that major brand stations are opened? A. Well, a private brander such as Kayo generally stay open as I say three hundred sixty-five days a year and sixteen to eighteen hours a day. I think

you'll find very few of them open twenty-four hours a day now.

Q. How much does the Kayo Oil Company spend nationally in advertising? A. Nothing, zero.

Q. Does Kayo operate either in Maryland or anywhere in the country service stations as opposed to gasoline sales stations? A. The ser—the Kayo stations, or they're really filling stations that we have in Maryland are typical of the stations that we (T. 129) have throughout the system in all other states.

Q. For the record and benefit of the court, I'd like to show you—these are two sets of photographs which Mr. Woodstock has seen and first tell us what kind of station this one is, right there. A. This is in LaVale, Maryland. This is a station that was built new from the ground up. This is a typical Kayo station with four pumps and it has just a small shell here, a little covered place for the attendant or manager to count his money. It has a small warehouse, about the size ten by ten and two very small rest rooms. That's the extent of the facilities.

Q. Is that typical of the stations in Maryland and elsewhere that— A. Yes, sir, this is typical—

Q. —are built from the ground up? A. This is typical of the station that we have everywhere.

Q. Now you haven't built all of your stations, have you? A. No.

Q. You have purchased—

(Mr. Preston) We'll offer this, if we may, as Continental's exhibit one, Your Honor.

(T. 130) (Court) All right.

(Clerk) Exhibit two.

(Sheet of photographs filed herewith as plaintiffs' Exhibit No. 2A).

Q. And some of those that you have acquired were already used as stations, is that right? A. This is a—this is

a station in Hagerstown, Maryland that was an old Pure Oil station which was converted to a private brand Kayo operation. We closed in the lube bay areas and this is one where we would use for storage and as you mentioned the office for a supervisor.

(Mr. Preston) What would this be, two?

(Clerk) 2b.

(Mr. Preston) 2b.

(Sheet of photographs filed herewith as plaintiffs' Exhibit No. 2B).

(Mr. Preston) All right to proceed, Judge Childs?

(Court) Yes, sir.

Q. Mr. Chandler, from a standpoint of supervisory organization or personnel above the actual stations, what does Kayo maintain? A. Well, we have really a simplified, streamlined organization structure. Above the station we have a field (T. 131) supervisor, we call him a district supervisor, one for each seven or eight stations. So that would mean we have eighty district supervisors and eighty districts. Each district has one.

Q. Now let's stay with this field supervisor who has seven or eight stations. Does he have an office? From where does he operate? A. Well, he has an office usually in one of these closed lube bays or in the back of one of the service stations in this district.

Q. All right, go ahead. A. I might add that these field supervisors have without exception all been promoted from a—usually a driveway attendant so they are very familiar with the operation of the station.

Q. Go ahead, above the field supervisor. A. Above the field supervisor for these eighty districts that we have spread out through eighteen states, we have about sixteen areas. These are divided in areas that are supervised by an area manager. Now they, too, have come up from the ranks as attendants or manager without exception. They

have—also have an office somewhere among their, oh, they have—somewhere, maybe alongside one of the district supervisors in one of the closed lube (T. 132) bays but they have no office personnel, no staff, no secretary. They—oh, we allow them to have little adding machines so they can audit the station or a pocket computer maybe is all the equipment they have. No typewriter. No need for it.

Q. Does Kayo rent any offices other than the home office in Chattanooga? A. We rent no office and the one in Chattanooga is the original one founded by Mr. Kendall when he came there in early 1950 in an old converted Butler warehouse building.

Q. And above the district supervisors, what management? A. That's all we have in the field. Outside of Chattanooga it's the only organization we have, the area managers, the supervisors and a station manager and personnel. In the office we have four division managers. They're based in Chattanooga and there, you see the area managers report to—some eight or—four area managers would report to one division manager in Chattanooga. Now above that we have two vice presidents of operations and above that one executive vice president and myself. It might be interesting to note that all of the personnel of Kayo that I've talked about, the operations people, executive vice president, the two vice presidents of operations, (T. 133) division managers, all started as attendants on the driveway. I guess I would be the exception, but I have worked on the driveway. In fact I've gotten some—there've been times when I've had to when a station had been abandoned or somethin' when I've been out on an inspection trip and then I'd go back to the office and get a letter from some customer complaining about that seedy character out there that needed a shave, for example.

Q. Mr. Chandler, at what price does Kayo sell its gas at retail generally speaking through your experience in the company in comparison to the major brand dealer?

(Mr. Woodstock) Objection. Your Honor, the category of what constitutes a major brand dealer—

(Court) Mr. Woodstock, are you having problems standing, sir?

(Mr. Woodstock) Excuse me. The definition of what constitutes a major brand station is quite a contention. No matter what source you refer to that reports these types of figures, they include various actors within the group or not within the group and we would ask perhaps that if they want to pursue this line of questioning that they refer to the listing of the participants in the Maryland market provided in the pretrial order at page 13 as opposed to this broad generalization.

(T. 134) (Court) Mr. Preston, do you want to speak to that?

(Mr. Preston) May I see the pretrial order?

Q. First of all, tell us—this is the pretrial order. You're going to have to look at it, right. Now tell us what you mean when you say a major brand dealer. What do you mean by that? Tell the court. A. Well, a major brand dealer would be one who has the branded, accepted brand, nationally advertised accepted brand and who offers as we described here the full service, full range of the retail service.

Q. Can you give some examples of the brands that are nationally advertised and kind of dealers that offer full service? A. Exxon, Gulf, Shell, Texaco, I don't want to hurt anybody's feelings here. These are national—

Q. They're examples of the major brands that you're talking about, is that right? A. Sure, right.

Q. All right, now with relation to that type of major brand dealer who you've mentioned at what price has

Kayo generally been able to sell its gas with relation to that price? A. Well, historically Kayo and other private branders (T. 135) have sold three to four cents a gallon under these major brand dealers mentioned.

Q. Why are you able to sell your price or sell your gas at three to four, five cents less than the major brand dealer? A. Well, obviously all of these services that we've talked about are very expensive, the road maps, the nationally advertising, the lube bays, the higher skilled personnel and so forth, they're a lot more expensive and they cost a lot more to operate a major brand than it would to operate a private brand. So this savings over the years that we have effected a bare bones operation we can pass it on to the consumer and that's how we—the only way we can survive since we do not have a brand acceptance. We appeal to the people that want a lower price and do not want the frills.

Q. Mr. Chandler, at the time of the pretrial order the exhibit that it has with it it lists sixteen Kayo locations. I believe that there are now how many Kayo? A. Fourteen.

Q. Fourteen. A. Fourteen in Maryland. Six in Baltimore City and eight in the outlying areas.

Q. And from time to time you have opened a total of nineteen stations in Maryland since '64, is that right? (T. 136) A. Since 1964 right.

Q. And you are now down to fourteen and this is a list of the nineteen stations taken from the answers to interrogatories, which I will offer, you needn't identify it, I've shown it to Mr. Woodstock. A. Right, yes.

Q. And it merely says closed or open on it and the date the station was opened and the location.

(Mr. Preston) It will be Continental's 2C, if that's—

(Clerk) It will be Number 3.

(List of Continental stations filed herewith as Plaintiffs' Exhibit #3).

Q. Mr. Chandler, the gasoline that Kayo sells in Maryland is obtained where? A. Well, all the gasoline sold at retail to Kayo stations in Maryland have been obtained from Continental's terminal in Baltimore and delivered to the station in either Continental transports or in rare occa—exceptions would be by common carrier. This product at the Baltimore terminal comes there from Continental's Lake Charles Refinery through the Colonial Pipeline.

* * *

(T. 141) Q. Mr. Chandler, you said that Kayo Oil Company first came to the State of Maryland in 1964. A. That's right.

Q. I ask you, you were president of the company at that time? A. In 1964 I was vice president of operation. I became president a year later.

Q. You're right. I stand corrected. Would Kayo have come to Maryland in 1964 if there would have been a law in Maryland that you could not have operated company operated stations in Maryland then? A. No way. No, sir. We could not have operated without company operated stations.

Q. Can you explain that any more to the court? A. Well, in order to maintain our price posture which is a low price marketer, you've got to have full (T. 142) control of all your operations and the most important control of all is control of your retail price so without that we just couldn't operate.

Q. All right. Are you familiar with Paragraphs B and C of Chapter 854 of the Laws of Maryland of 1974? A. Yes, sir.

Q. And directing your attention to them, if the—if that law should become effective, what will the Kayo Oil Company do from a competitive standpoint with regard to its operations here in Maryland? A. Well, of course,

we've given this a lot of thought, naturally with having this kind of investment in Maryland. We couldn't operate with dealers because we don't have the organization or the structure or the expertise. We don't have the know-how to recruit, train and organize dealers or the staff necessary to support them. If we were to—even if we were to try, we would have to make such a substantial investment to change those Kayo stations shown in the pictures here that there's just no way those stations could be converted to the full service types. The amount of investment would be—make it economically unfeasible. We just could not operate any other way than we are now with full control because with dealers you would have to increase the cost of your gasoline to make up the increased mar—marketing (T. 143) costs would have to be passed on and then to sell Kayo alongside the Exxon, Shell, Texaco, Gulf, Arco and so forth would be impossible because we don't have the brand acceptance and it would take years and years to get it.

Q. Do the same factors that you described a moment ago with relation to 1964 and the necessity of controlling the price still persist today? A. Absolutely it still persists today.

Q. What will Kayo do then if the law becomes effective, Mr. Chandler? A. Well, I see no alternative but to close the stations, remove the equipment and put them up for disposition and we'll just leave the Maryland market.

(Mr. Preston) That's all I have. Your witness.

CROSS EXAMINATION

By Mr. Woodstock:

* * *

(T. 144) Q. I'm trying to get something straight here. What's the nature of Kayo as an entity today? Is it a

separate corporation? A. Yeah, Kayo is a separate corporation, of course, we're a wholly owned subsidiary. We're a Delaware corporation, wholly owned subsidiary of Continental Oil Company.

Q. Do you have a separate board of directors? A. Oh, yes, we have a separate board of directors. We're completely autonomous in our decisions and everything. Of course, we—being a subsidiary we—

Q. Have you issued stock of your own? A. No, no.

Q. Well, ultimately then— A. Well, Continental—

Q. —board of directors that—

(Mr. Preston) Let him answer the question.

A. Well, Continental primarily, of course, owns the stock in Kayo. Yeah, there is a wholly owned subsidiary. They own the stock in Kayo one hundred percent.

Q. Well, then if as in most corporations the board of directors answers to anyone they ultimately answer to the stock holders. Would you agree with that? A. Well, so I—there's no question we—I answer to Continental Oil Company.

Q. And if Continental come into today because of the (T. 145) nature of their ownership of—outright ownership of Kayo and replaced your board of directors by a vote of whatever would be necessary for them to do that, there's nothing Kayo Oil could do about it— A. Well—

Q. —the board of directors would cease to operate. A. That's right. They own the stock one hundred percent. That would happen in any corporation.

Q. Do you know for a fact that if this law is upheld that the Board of Directors of Continental Oil have already voted and come to the conclusion that they will totally withdraw from the Maryland market? A. You talking about Continental?

Q. Or was that— A. Continental's Board of Directors?

Q. Yes. A. No, I don't—I don't know that they've made that decision.

Q. Kayo's Board of Directors have made that decision? A. Well, ah, I'm on the Board of Directors and my two operating vice presidents are on the Board and the executive vice president so certainly we've made that decision.

Q. Would that decision – (T. 146) A. Not formally, not formally.

Q. Would that decision be just implemented after your vote or would it be some sort of procedure by which the Board of Directors of Kayo would clear it with Continental? A. I'm absolutely free and this has been a great relation, I'm absolutely free to open stations, close stations as I deem fit. Continental has never you might say second guessed me on that.

Q. Have you ever opened or closed all the stations in any given state? A. No, I haven't done that before.

Q. So you've never tested then– A. No, I–

Q. –the limits of your autonomy? A. That's right, I didn't test it. I'm sure they wouldn't want me to operate stations that I consider unprofitable.

Q. You think they might want you to explore all possibilities? A. Well, I'm sure I would.

* * *

(T. 159) THEODORE LEVITT,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.

(Witness) Theodore Levitt, 43 Crevice Lane, Belmont, Massachusetts.

(Clerk) How is your last name spelled?

(Witness) L E V I T T.

DIRECT EXAMINATION

By Mr. Noonberg:

Q. Professor Levitt, what position do you now hold? A. I'm Professor of Business Administration at the Harvard University Graduate School of Business Administration.

Q. And for how long have you held that position? A. I've held that position since 1965.

Q. Could you give us a brief summary of your educational background, sir? A. I received a bachelor's degree from Antioch College in economics, PHD in economics from Ohio State University.

Q. Could you give us a brief statement of the various positions that you've held in this field? A. Upon my graduation in 1951 from Ohio State University, I was a full-time consultant to the Ohio AFL-CIO Council for a period of approximately six months, after which I became assistant professor of economics at University of (T. 160) North Dakota in 1952, position I occupied until the spring of – the end of the spring of 1955. In 1955 through the summer of 1959 I was an economic consultant in Chicago occupied almost entirely with matters in the petroleum industry. In 1969 (1959?) I went to Harvard University as lecturer of business administration and then became professor of business administration in 1965 as I told you.

Q. What course have you taught at the Harvard School of Business Administration? A. I've taught the course, the first year graduate course in marketing at the Harvard–the Business School. I for a period of three years during my tenure there was Chairman of the first year marketing course, for a number of years I taught a projects course which was called Creative Marketing Strategy, a course in which groups of students did and continue to do although I don't teach it at the moment project work

analyzing business problems for sponsoring business corporations, for a period of three years I taught the marketing course, the advanced management program which is a course for senior executives for industry around the world that come to Harvard University. I am currently teaching a similar course in marketing for a middle management program of executives from corporations around the world and the United States.

(T. 161) Q. Professor Levitt, have you—have any of your writings been published? A. Yes.

Q. Can you give us a summary of some of the more significant writings that you've had published? A. I've authored five books on marketing and business subjects and been the co-author of a sixth. I've published well over a hundred articles on marketing, business policy and economic matters. One of my books, INNOVATION IN MARKETING, was—was cited as one of the best business books of the years by the Academy of Management. Four of my articles were, which were published in HARVARD BUSINESS REVIEW, were—received the annual McKinsey award for the best article in the HARVARD BUSINESS REVIEW for the year. I am—articles have been published in a wide range of journals, from business journals, professional journals in economics and public affairs.

Q. Have you received any awards in the field of economics or business management other than the ones that you've just mentioned? A. In 1968 I received the Charles Coolidge Parlin Award as the marketing man of the year and in '69 or '70, I've forgotten the exact date, one of my publications and some of my work was cited as—under—I received—I guess it (T. 162) was I received the Hancock Award for excellence in business publications and business journals.

Q. By the way, Professor Levitt, have you ever appeared in court as an expert witness before? A. Never.

Q. Dr. Levitt, after you were retained by Exxon and Continental in this case, what work did you do to prepare yourself for your testimony this morning? A. I did—well, first of all, I did considerable work which I co—I will explain. With a twenty year background in the petroleum industry, I was reasonably able, I thought, to focus that work to the particular situation given the background that I had in research and consulting in that industry. Specifically I spent considerable time reviewing the facts of retail marketing and petroleum product distribution in Maryland in relating those to facts as I knew them on the basis of my own studies and familiarity with the industry elsewhere. I visited and spent a total of three days travelling in the Maryland market, specifically looking at the configuration of retail stations, the type of retail stations trying to examine the understanding of the uniqueness if there was any or the character of retail operations in Maryland. Most of the—two of those three days I spent in the greater Baltimore metropolitan area and the other time (T. 163) I was in the Eastern Shore in Cambridge. I had discussions with six members of the Exxon marketing organization at levels dealing with Mr. Harvin's level, who is, you know, is regional manager here and levels below that down to direct supervisors of retail operations. I spoke directly I think to ten to twelve operators of retail service stations, some dealers, some company operated operators including those of a variety of brands. I spent in addition to the time reviewing the background considerable amount of time—this all began approximately last fall, considerable amount of time reviewing the various documents that were drawn up by the counsel for Kayo and for Exxon, consulting with them regarding the content of some of those materials

and the meaning particularly of the economic and marketing facts and dynamics that were referred to in that documentation.

Q. In connection with the consulting work that you've done, Professor Levitt, could you give us some of the subject matter areas that you've done consulting work in? A. I've done consulting work primarily in three major areas, functional areas, one dealing with marketing problems business organizations, petroleum industry and others, I would—my range of work insofar as industries are concerned involves a wide range of companies in retailing, like Montgomery Ward, for example, in the oil business, in steel, in (T. 164) aluminum, in industrial chemicals, in a whole range of consumer products from toiletries to food products to consumer soft goods, like apparel, involving numerous companies in this country and abroad, electronics, with a heavy focus on marketing problems and a great variety of issues that are involved, pricing, distribution, trade policies, advertising, promotion, sales organization, staff work, market research. The second major functional area has been in areas of business policy which is an area or at least the conventional taxonomy is that business policy deals with all those things which are concerned with the strategies and tactics of a company that involves things—that involve all functional areas, such that policies may have to do with where we should locate our plants and why we would want to locate it in x location versus y location with respect to the question of how that affects particular competitive strengths or opportunities for a firm dealing with financial policies as related to the whole organization dealing with problems of executive development, executive placement, selection of executives for high-ranking positions, dealing with government relations. And the third functional area that I have been involved in have

dealt with government relations, particularly in the antitrust and federal trade area and advising firms regarding their practices as they relate to the law, though I'm not a lawyer pretty (T. 165) obviously.

Q. Professor Levitt, directing your attention to the petroleum industry, can you give us just some of the areas in which you've been directly involved in petroleum industry problems? A. My first involvement with the petroleum industry began in 1955 and that involved originally making studies of the retail configuration of a particular major brand, its retail practices as they revealed themselves in locational activities of stations, the type of stations, the way in which the stations were operated, the kind of training they gave a dealer. Where the object of the studies was to help to get firms and to get the particular client some sort of an indication of what the reality of what was going on and how the retail was from the vantage point of someone who knew nothing about the petroleum industry and who, however, had sufficient training in economics to be able to advise them as to the meaning of what went on with respect to certain anti-trust and Federal Trade Commission issues that the company almost continuously faced at that time.

Q. Subsequent consulting work in the petroleum industry— A. In the petroleum in—subsequent—well, as a consequence of this where the object as I say was to provide them with information respecting—respecting what their internal (T. 166) operations seemed to be like from the point of view of how they might be viewed by the Federal Trade Commission. At the time I got a rather considerable education spending approximately eighty or ninety percent of my time out in the field making studies and talking with people with a new language and a new and a different way of viewing the world than the economist usually views it. As a consequence of that, I

came up with certain notions that dealt with strategic alternatives that might be available to that company and so unsolicited I made some suggestions to them regarding marketing strategies and the consequence of that was that I drifted finally in the—during the latter two years of my work in Chicago where I was in the consulting business as I indicated into problems of marketing strategy and tactics from the point of view of just commercial policies as opposed to the question of the relationship to governmental affairs.

The consequence of that was after I joined Harvard hadn't—gotten some reputation in the industry by then and published some things rather frequent requests from other oil companies to help them on strategic matters and that involved questions of representation policies, how many stations should someone have in an area or in a given community. It dealt with questions of the type of stations one might have, large or small, many bays, no bays, few bays, (T. 167) number of pumps. It dealt with questions of dealer operations versus company operations. It dealt with questions of pricing. It dealt with questions of the physical distribution and their costs, the optimizing and developing optimizing models with respect to those.

Q. Professor Levitt, have you reviewed Chapter 854 of the Laws of Maryland 1974? A. I have.

Q. And have you specifically reviewed the provisions of Paragraphs B and C of that Act? A. I have.

Q. Have you formed an opinion as to the affect of that Act on the Maryland consumer? A. I have.

Q. What is that opinion?

(Mr. Woodstock) Objection.

(Court) What's the objection?

(Mr. Woodstock) Your Honor, I don't believe that he's testified that he's done any interv—done any research as

to its impact upon the consumer. He said he's researched the retail marketing with regards to the facilities utilized by these people. He's talked to service station dealers but as far as I can recall he's said nothing about consumer studies with regards to the State of Maryland and consumer preferences.

(T. 168) (Court) Sustained.

Q. Professor Levitt, have you formed an opinion as to the effect of the Act on competition in the retail petroleum market? A. Yes, I have.

Q. What is that opinion, sir? A. The opinion is that the consequences of the Act would be to reduce the competitive vigor of the retail petroleum marketing in the state with a consequence of increased prices for—at the consumer level and a reduction in the variety and convenience of the retail offer available at the retail. I might say, Mr. Noonberg, if I might, specifically that the process of the work that I did here was in preparation for this leads inescapably and inevitably to a consideration of what the competitive effect is going to be and by deduction it is very easy to see how that competitive effect impinges upon the motoring public.

Q. All right, well, let's—we'll direct your attention to the competitive effects of your studies and the background and experiences you've brought to bear and I think the conclusions concerning that will be apparent. Now, Professor Levitt, you used the term by the way "retail offer" in connection with your response to my last question. Could you explain to the court what you mean and what is generally (T. 169) meant by the term "retail offer?" A. Yes, that's probably useful. Retail offer refers to that mix—that variety and mix of goods and services, convenience and benefits that are provided by retailers for the—in connection with their efforts to attract and hold retail patronage. In petroleum business,

for example, this means the prices that are offered, for example, the range of prices, the mix of prices within the range, that is to say, whether there is a large variation, not just whether there's a large variation or a small variation in prices, but what the distribution is within that range, whether it's more on one side that the other side, it deals with the variety of product that's offered in gasoline, the variety of other kinds of products, TBA, the TBA reference, tires, batteries and accessories, it deals with actually the convenience of retail locations or where they're located in terms of how people travel and where they travel, the quality of the services that may be offered, the reliability that are associated with them, the guaranties that may be offered. It deals with the promotional activities, the inducements that may be used to attract and hold patronage other than price in itself. It deals with the management of the retail process so that the station perhaps looks either clean or not clean, whether the station looks streamlined or whether it looks in some fashion (T. 170) by some standards that are differently. It deals with the speed of driveway service which is very critical in the petroleum industry and retailing for major segment of the population.

Q. Now, Professor Levitt, you indicated that in your opinion Paragraphs B and C would result in a reduction in competition, an increase in prices and a decrease in the retail offer.

(Mr. Woodstock) Objection. Your Honor. I believe the witness stated it would reduce competition—competitive vigor in the state not competition or the broad term "competition" which does encompass apparently consumer preference.

(Court) Rephrase your question please.

Q. Professor Levitt, I believe that you indicated that it is your opinion that the effectuation of Paragraphs B and

C of Chapter 854 would result in a reduction in competitive vigor in the retail petroleum industry, an increase in prices and a decrease in the retail offer. How would you explain please, sir, how that would be caused by Paragraphs B and C of the Act? A. There—by definition certain firms now doing business at retail in Maryland will be excluded by virtue of the fact that those two provisions are divestiture provisions would prevent firms which are partially or wholly (T. 171) integrated in the production and refining from operating in this state so by definition you get a reduction in number of competitors and I think I can show as well the equivalent a reduction in competitive vigor. Two, the Act would clearly restrict entry of competitors in the market and three, I believe those provisions of the Act would substantially reduce the likelihood of customer benefitting innovations and experimentations of retail.

Q. Would you explain please now taking each of those elements that you have identified separately, would you explain please to the court how Paragraphs B and C will result in each of those consequences? A. Well, the reduction—the reduction in the number of competitors and number of retail service stations that's occasioned by divestiture provision which means—which requires firms that are integrated in some proportion to divest themselves of those retail operations means that there is a great likelihood that, you know, ba—obviously they will be deprived of the right to do retailing business in that fashion in the state and that leads to a reduction in competitive pressure and competitive vigor particularly in respect to prices. If I may—

Q. Would you explain why you say that? A. Yeah, I'd like to explain that because it's surely (T. 172) almost central to this matter of the price part of the opposition at least.

There are in the pretrial order in Exhibit B, the facts that everyone has agreed to, it lists two hundred and thirty-three company operated retail service stations. Of those two hundred and thirty-three, two hundred and nine operated—would be excluded under the Act because they are operated by companies that would be precluded from those kinds of operations under the Act. Of the two hundred and nine a hundred and forty-seven of those stations are operated by companies that have chosen to use price as an important part of their competitive strategy. They are the kinds of stations which were yesterday referred to as sort of price marketers. So it is—and they I think perform a profoundly important function in creating the vigorous competitive price pressures in the Maryland market and in other markets that I know quite well elsewhere because they have employed price as a central part of their marketing strategies, a central part of what it is they're trying to do to attract and hold consumer patronage focusing their effort on that segment of the population which responds to price, which, by the way, is getting increasingly larger. Now to understand it seems to me why it is a particularly serious problem which I believe it to be to exclude them from the market, it seems to me we ought to talk about (T. 173) a couple of other things. First of all, we heard Mr. Chandler's testimony yesterday in which he asserts that there is no way in his judgment Kayo Oil Company could operate, could provide and offer these lower prices except through dealer operation—

Q. Except through— A. Except through, excuse me, except with dealer op—except through company operations because company operations provide certain kinds of economy particularly in management, particularly in labor and particularly in the use of other resources like

land and equipment, but is able to get the cost structure down so they can use price as a competitive weapon.

I think that is not only true with Kayo but it's true with the others as well. As a matter of fact, it's useful to understand that when we talk about so-called price marketers they're not all the same. They—there is also a major difference in the retail offer among so-called price marketers or independent brands. One needs only to see if—one doesn't need to be a marketing expert from Harvard University or anywhere else to see that, all you have to do is drive down the street and take a look at the difference between a Kayo station and a BP station. You can see that there are major differences in the strategic tactics here although price is one of them, but the common thread among them is that they have (T. 174) to get their operation, the costs of their operations down such that they have enough play to be able to use price as a competitive weapon; and we know that this is the method by which almost all price marketers, the large proportion of price marketers in the case of—that this is the method by which they operate because that's the way they can get their costs down to deal with that particular segment.

Now the interesting thing is that this is not an isolated situation of the petroleum business and if I could have a minute, I'd like to explain what I mean about that because I think it's useful to see how the particular competitive function that they perform in this industry relates to what's happened elsewhere.

Q. Please do, sir. A. Now there's a very common concept that's used to—to—that explain, if you will, a particular phenomenon that seems to have repeated itself over and over again in marketing around the world through its long history and that is the concept of the wheel of retailing. The wheel of retailing says that in the

retailing world some things happen over and over and over again. It's just a wheel that keeps turning and this has been sort of documented historically going back to Babylonian days and one of the major things that happens over and over again is that certain (T. 175) kind of retailing institutions develop. Take, for example, the department store. The department store developed in the United States in around 1890s and it was a revolutionary development. Department stores were treated by the competitors that they displaced, namely, the small specialty shops stretched along—stretched in a downtown area of cities. Department store was greeted by existing retailers with about as much love as the discount store was greeted by department stores in the 1950s because what the department stores did was provide the consumer with a different retail offer. He had lots of departments, that is, the specialty departments under a single roof which provides the convenience and ease and the simplicity which attracted the patronage since the people wanted to shop there. Department stores were profoundly important, the seminal retailing marketing institution of the nation for well over fifty years until lightning struck in the 1950s with the rise of what we now call the discount store. We now call them mass merchandising stores, it was the discount store that we know today as K-Mart and Woolco and Arlans and Zayres; and originally those discount stores—they started up in Pawtucket, Rhode Island for the most part and all they were really was stores selling consumer—dispensed consumer soft goods, dresses, textiles that were left over from companies that either had fires, went bankrupt or—or didn't plan very (T. 176) well and you can't plan very well in many cases, always going to be some disaster; and what they did is they took old, abandoned warehouses and they started to sell this stuff off at

so-called distressed prices because they bought it at low prices. Well, the few fellows like that did this—this is very well documented, by the way, Mr. Noonberg, a few people did this and they found that the patronage was so strong they started to arrange to buy products manufactured for their—for them as distinguished from just buying distressed products and that was really all—it was called the retail—the soft goods revolution it was called. It quickly spread, phenomenonly rapidly into hard goods and other kinds of items that we see today. An interesting thing about it, what was their success, the reason they were successful in—to a considerable part was that they had very slimmed down, low cost operations, first in abandoned warehouses or in old abandoned textile mills. Two, they offered no delivery, they offered no credit, they offered no sales help; that was self service. They offered no returns. It was an absolute slim down operation and so the patronage—what they were—they discovered suddenly that there was a low price market or a market out there which was very, very much responsive to lower prices rather than the elaboration of service which had in the meanwhile been built up in the department stores. The department stores (T. 177) had increasingly more elaborate furnishings, increasingly more elaborate decor, increasingly more proliferated costly activities and so their cost structure had come up and these people just slid in underneath them in the cost structure and they priced that way.

(Mr. Woodstock) Dr. Levitt, excuse me.

Your Honor, I'm going to object. It's beginning to sound like a lecture.

(Court) Well, that's what it was designed for, wasn't it?

* * *

(T. 178) A. Yes. I think the same thing – the supermarket is the same kind of an illustration, Your Honor, that's happened in the 1930s, but what's involved simply is a stripped down, simple, easy operation that's slides in under the more elaborated wider service, higher cost institutions that have grown up and so the wheel turns and this as the supermarket and so now we have the so-called discount revolution and mass merchandising.

In the petroleum industry the same thing happened. Yesterday Mr. Chandler referred to the growth of the petroleum industry where the original discounters were people who operated gas ations next to railroad spurs, if you will recall that he referred to. He's quite right about that. That's where the spur name came from. That's where the word tank car price comes from that's used in the petroleum industry today. It was the price at the tank car and these (T. 179) original institutions were the same kind, they—they provided just a pure gasoline service; people had to go out of their way to get there and there was no investment—hardly any investment in real estate and hardly any investment in any kind of service.

What has happened is in the petroleum industry is that as things evolved we see a larger and larger proportion of consumers responding to that type of marketing, that kind of price. We also find increasingly as in the retail business where we see that the discount store today isn't the old warehouse operation it used to be any more or the old abandoned textile mill any more. They've built buildings of their own in high-priced locations designed specifically for that kind of mass merchandising and that's what's happened in the petroleum industry as well.

Q. And what conclusions do you draw from that historical example and that concept of the wheel of retailing? A. The conclusion that I draw, Mr. Noonberg, is there is a kind of a constant competitive evolution going

on that consumers cha—tastes and preferences and notions about what value is changes over time, that in open environment there are lots of eager entrepeneurs out there who seek to convert that change in consumer preference and taste to their own advantage by exchanging their energy and their imagination and the (T. 180) provision of certain kind of retail offers for the consumer patronage.

Q. And what conclusions do you then draw with respect to that on Paragraphs—the effect of Paragraphs B and C if effectuated? A. Conclusion is that the only way you can get those costs down which we have demonstrated before and which have happened to other forms of retailing if you control the operation heavily to get the low cost operation, in order to get that low cost operation in order to be able to offer a low price with that mix of consumer benefits; and what we have here in this legislation is really an attack on commercial evolution, reducing the number of competitors, forcing some of them who operate this way out who are the most—who are the most vigorous in their assertion of using price as a competitive weapon, who are responding to what's going out in the marketplace, denying them an opportunity to do that and as a consequence eliminating the kind of price pressure which they provide in the market which tends to assure that on a general competitive basis in the Maryland market we will have a kind of a—an equilibrium of minimum prices with the kind of a range of other retail offers that people want. I think the thing ends up clearly to be anti-competitive and anti-consumer.

Q. You used the term "minimum prices", will result in (T. 181) minimum prices, do you mean maximum prices or did I misunderstand your point there? Let me direct the question to you directly. If Paragraphs B and C are

effectuated, what result will this have on retail gasoline prices in the State of Maryland? A. It will raise them.

Q. Thank you. You indicated, Professor Levitt, that in your judgment as a result of the effectuation of Paragraphs B and C barriers to entry will be created in the retail petroleum market. Would you explain what you mean by that, sir? A. Yes, sir. By barrier to entry I mean that it will create positive disincentives for new marketers to come into Maryland and it will create positive incentives for some who are entrants now, who are here to leave; and there are at least sort of three ways it seems to me in which that conclusion can be verified.

In the--however you classify integrated companies what proportion of crude they produce or what proportion of refined, what proportion of the products they sell they refine themselves, however you classify, whether the FTC is classifying them or the Lumberg organization out in California which is the best known and best regarded organization that does sort of studies of industry, pricing conditions in retail (T. 182) operations, it's widely published; everybody uses the data. However you classify those, there's one group of sort of a group number called group one brands that operate. They have--sell by brand in twenty or more states around the nation and have the larger proportion of integration. All those fifteen brands are in Maryland, operate in Maryland now. Group two category consists of thirty-seven companies that operate in either less, twenty or less states that are also integrated in some proportion. Of those thirty-seven integrated companies only five are now represented in Maryland, PMC, Crown, Tenneco, Ashland and Hess. Thirty-two are not represented.

As I can--as you can see from the list--just of those five, a large proportion of those thirty-seven, first of all, have aggressive pricing practices that the segments of the

consumer tool which they address themselves particularly and they use price as a powerful competitive weapon with the kind of streamlined operation, the kind that I talked about before, although not necessarily or totally. They would be excluded from this Maryland market. Their names are known. There they are. We've only got five out of thirty-seven. Entry for them would be prohibited; and this business about even if they didn't use price and therefore company operated stations as a competitive weapon to come in, they would probably be excluded anyhow because of this legislation which (T. 183) prohibits company ownership and that I think is the second question to which I want to address myself.

You heard Mr. Harvin say yesterday that when Exxon entered the Florida market it was during the fall of '61 if I recall correctly. They did so through company operations in order to establish locational routines, in order to establish an image of presence that would attract dealers because why should a dealer go to a new brand when he can go to an established brand. He reduces his risks and how could they attract dealers. Actually Exxon originally went into Florida with company oper--with dealer operations. They found that dealer operations simply did not work and they changed to company operations and they stayed with company operations for five or six years, almost six years in order to build up a reputation of their presence, in order to understand the management of that particular market in such a way as to be able to attract dealers who could--who would risk their own capital on dealer operations. The same thing happened to Exxon when it went in Ohio; and it went in Ohio as a brand; it had--it started off in dealer operations. It didn't work. It went to company operations. They were in company operations for a good number of years before the image and the reputation that

it built sufficiently that they could attract dealers who would risk their capital to operate Exxon (T. 184) stations on a dealer basis. So the entry of unknown brands even with an enormous reputation that Exxon is presumed to have here in Maryland and it does have in Maryland, but not everybody lives in Maryland, we see in those situations, in those two states even with that reputation they found that they have to have company operations, therefore, the entry into a new market is most commonly accomplished I think we can see that even for well-known brands and those remaining thirty-two are not that well known. Some are like Marathon, for example, or Clark. Even they require a period at least of company operations in order to establish themselves so they can be effective in the marketplace, sufficiently effective to shift to dealer operations to be able to attract dealers.

Q. What was the third aspect of these barriers to entry that you referred to, Dr. Levitt? A. The third aspect really deals, you know, primarily with backward integration.

Q. What do you mean by that term? A. Well, it's sort of an economic term. It–

Q. Well, in the context of this case. A. Okay, in the context of this case what it means is this that anybody who is purely a marketer in this state now and who is not–who is not a refiner or not a producer like Hudson, for example, or Homoco, for example, anybody (T. 185) who is now just a marketer under the provisions of Paragraphs B and C if that marketer wanted to integrate backwards and get into the refining business or get into crude business, he would either have to divest himself of the retail operations in Baltimore, in Maryland or would have to change his mind and not go into the refining business. Now–

Q. What effect does this have on competition? A. Well, it–one, it has I think a tendency it will, no question, I think it will reduce competition at retail because they have to withdraw and it will also reduce–and if they withdraw, if they decide not to go into refining, for example, it reduces the amount–the number and amount of competitors at refining and, therefore, at wholesale and reduces the sort of pressures to get prices down. I might say, Your Honor, this is not a speculative matter about integrating backwards. It's a matter of fact, it's a venerable tradition in this industry as in others. John D. Rockefeller who cannot be accused of being unknown anywhere around the world, started this way. He was a vegetable peddlar in Cleveland. He got into the oil business. He was an oil peddlar and he integrated backwards; and right here in Baltimore we have the case of Jacob Blaustein who was the originator of what is now known as the American Oil Company. He also started as a peddlar. More recently we have Hess (T. 186) in the same situation is a very vigorous marketer who's done the same thing. More recently we have had trade reports through Mrs. Hudson, who is a vigorous price marketer, throughout the mid-continent and East, has said that she is considering getting into the refining business. Only in September we find that Frank Ulrich; who runs the large Uco Oil Company in California, who is a vigorous retailer, has just gotten in the refining business by buying out a twenty-five thousand barrel a day refinery that Gulf Oil can't make profitable but he thinks he can. We have John Shaheen. Well, Shaheen played around in other areas as well, but he built–he went in the refining business building one from scratch. We have Scots which has twenty-one stations in Baltimore, in–in–in Maryland, which started out as a retailer. PMC, Petroleum Marketing Corporation, integrated backward in refining. It's not

something happened long ago in Ohio with John D. Rockefeller is what I'm saying. It's a venerable tradition. It's happening now so this idea of integrating backwards—Clark has done it. That would be a great area to that kind of integration backwards unless they decided, you know, they've got to make one choice or the other. Either get out of Maryland with the price pressure and competitive functions they perform or not integrate backwards. In both cases I think the public is going to lose.

(T. 187) Q. In what way? A. Well, if they're not—if they get out of Maryland, if they don't use their particular competitive—their competitive presence is not felt, which has a price reducing consumer benefitting quality; and if they don't get in refining with their particular kind of strategies, then the volume of product they would produce would not be available at wholesale would create competitive pressures there, reduced price.

Q. Professor Levitt, you also indicated that opportunities for innovation in the retail marketing of petroleum products would be reduced. Would you explain that, sir? A. Yes. We heard testimony yesterday about certain innovative and experimental activity. You don't have to call them innovations. You can call some of them experimentations. Somebody—it may be an experiment where you try to do something that someone else has done but the consequence may be the same from the point of view of the economic consequences or competitive consequences. I think Mr. Harvin's testimony yesterday with respect to that was interesting.

I think what we see here—he was thoroughly talking about two innovations. If I could explain, there—you can talk of innovations in two terms. You can talk about institutional innovations and you can talk about functional innovations.

(T. 188) Q. Could you give me an example of— A. Well, the institutional innovation is like the mass merchandising discount store versus department store or the supermarket versus the the corner grocery store or the major car care center versus the corner service station or a car wash addition or a—even a self service gasoline station, something that's happening right now. The self service station is not just a sort of functional innovation. It costs between eight and twelve thousand dollars to convert a station from general operations in Montgomery County here and Baltimore County from a regular station to a self service station because the fire laws require you to have certain kind of safety equipment. Now eight to ten thousand dollars is not a trivial number when you multiply it by five hundred and thirty-two. It comes to over five million. So the magnitude of that is an institutional innovation.

Operating innovations I would talk about fussing around and experimenting with hours different kind of merchandising techniques, playing around with the product line which you offer and which you don't offer, new kind of bookkeeping devices, new kind of training devices for and training methods or different kind of training and hiring practices for dealers, guaranties of repair and maintenance service, different kinds of strategies as (T. 189) according to how you lay out your service stations. It's surprising how much different in patronage you get by the way in which the service station is laid out on the corner. It's something trivial in the court room but from the point of view of commerce it's pretty important as to whether you have—as to whether you have it laid out diagonally on the corner or mostly facing one street or mostly facing the other street and these things have to be studied and played with and

understood and investments have to be made; and they have to be controlled. In both of those cases the important thing is if you're going to experimentation, you've got to do it under conditions which you can control and you can't control if the station or the operation is not owned by you. You can't tell a man exactly what to do, you can't tell him how to operate, you can't measure things, you can't do any of these things. It's like in a laboratory. You've got to have a controlled environment, otherwise you don't know what the answer really is.

So those kinds of innovations have almost always been done under controlled environment, which means you've got to operate the station; and if you don't—can't operate the station, then you can't control it and if you can't control it, you don't want to risk the experimentation because you don't know the outcome; and the experimentations (T. 190) of the kind that I've been talking about are experimentations that have only one purpose, one purpose ultimately and that is to provide and mix a retail offer such that the experimenter will be able to attract and hold more patronage; and the presumption is—the reason he attracts and holds more patronage is because he is doing something that the consumer wants and somebody is not. That's the only, final purpose of it. That's the only reason he does it, to get and keep patronage; and the consumer finally decides whether he wants to go to place X or Y or retail offer X or Y; and if you can't test that out because you can't control it and you can't study it and you don't want to engage in throwing money down an experimental rathole when you can't control the situation and know what the outcome is going to be, then it's just not going to be done; and the consumer benefitting results will not be there; and so for that extent again, it's anti-competitive, it's anti-consumer,

it's destruction of precisely the kind of momentum and variety and opp—and incentive system that you want it seems to me at least.

Q. Professor Levitt, have you focused an opinion as to the effects of Paragraphs B and C on the flow of commerce from and to Maryland from outside the state?

(Mr. Woodstock) Objection, Your Honor. I don't believe there's been any foundation in the interrogation of (T. 191) this witness on direct regarding a flow of commerce.

(Court) Well, he states that in his qualifications as I recall it he's studied all sorts of effects of the anti-trust laws upon economics and that sort of thing; and certainly if he's done that inherent in these studies would be the flow of commerce I would think.

(Mr. Woodstock) Can I ask then that we have a definition of the flow of commerce. It is a legal term used in anti-trust law with very significant meaning at least to me.

(Court) Well, all right, you can cross examine as to his qualifications as to that if you wish.

Q. Professor Levitt, you may answer the question. A. I have formed an opinion.

Q. And what is that opinion, sir? A. My opinion is by virtue of the Act creating as I indicated before positive disincentives for certain firms to invest capital and do business in Maryland and by creating positive incentives for them to withdraw not because of any vindictive matters but simply as a pure matter of economics, what will happen is there will be a shift from the normal course of flow of not simply capital but flow of petroleum products to Maryland and in and out Maryland to the extent that that normal flow is impeded, it seems to be a burden.

Q. Professor Levitt, do you see any benefit to the (T. 192) competitive process of the effectuation of Paragraphs B and C of Chapter 854? A. None whatsoever.

(Mr. Noonberg) No further questions.

* * *

(T. 192) CROSS EXAMINATION

By Mr. Woodstock:

Q. Dr. Levitt, my name is John Woodstock, Assistant Attorney General representing the State in these proceedings.

I believe in your direct examination with regards to publications on the oil industry, you indicated that you did publish a major piece of work about the oil industry back in 1959 or so? Is that correct? A. Yes, I believe it was in '59.

Q. Handing you a copy of the document, I'm asking you if that was the piece that you were just talking about. A. That certainly is.

Q. Would you read the title off of it, please, for the record? (T. 193) A. "Competition and Retail Gasoline Prices."

Q. And when was that published? I don't think there's a date on there. I had to look in the book review section to get it myself. A. I think it is 1959, a review of economics and statistics.

Q. Since that time have you published anything specifically on retail marketing of gasoline? A. Yes, I have.

Q. Could you tell me what they are? A. There were a series of articles in NATIONAL PETROLEUM NEWS.

Q. Anything else? A. No.

Q. Can you give me the approximate dates of the series of those articles in NATIONAL PETROLEUM NEWS? A. I think they were in about 1960.

Q. 1960, nothing since 1960? A. Nothing published, no, sir.

Q. By the way, NATIONAL PETROLEUM NEWS, NPN, I believe most people refer to it as, do you consider that an authoritative source on the petroleum industry? A. I think it is quite reliable, yes.

Q. Quite reliable. (T. 194) A. Yes.

Q. Do you recall specifically what the articles referred to and dealt with? A. The articles dealt primarily with the materials that were in that particular article that you've referred to plus other studies that I had done.

Q. What studies? A. Over a four year period I was intensively involved in studying consumer behavior in petroleum retailing.

Q. What four year period would that be? A. 1955 to '59.

Q. Speaking of 1955 to '59, I believe you testified you were an economic consultant in Chicago. A. Yes, sir.

Q. For the petroleum industry. Were you specifically, directly employed by the petroleum industry or a member of the petroleum industry? A. No, I don't recall it was for the petroleum industry. It was in the petroleum industry.

Q. In the petroleum industry. Were you working at that time as an independent consultant? A. Yes, I was.

Q. For whom did you work during that period of time? A. In the petroleum industry my work was exclusively (T. 195) for the Standard Oil Company of Indiana.

Q. That was the only oil company you worked for? A. At that time.

Q. If you recall, do you—you can recall for us what percentage of your work as a consultant during those years were to things other than the oil industry? A. It's some fractional percent between ninety-nine and a hundred.

Q. So it was a very small amount? A. Yes.

Q. Did you have an employment contract with Standard Oil? A. I did not.

Q. Did you have an office within the Standard Oil building or– A. I did.

Q. But you were not technically an employee of Standard Oil? A. I was not an employee. I was not part of the benefits program.

Q. Have you done any work for Standard Oil or any of the other oil companies since that time? A. I have.

Q. Would you give us some idea who they are? (T. 196) A. Yes.

Q. And the nature of that work please? A. I've done work for Mobil Oil Corporation, Exxon other than in relation to this litigation, Sinclair, Meadville Corporation.

Q. Are they an oil company? A. Meadville is the parent company of Saveway which now has an association with Hess, which is an independent firm heavily engaged in low price strategy market.

Q. What specifically did you do for Mobil Oil? And approximately when? A. The Mobil Oil period was roughly between I would say 1960 and 1965 to '66, extended for five or six–five years I think at least. I was involved and retained by them primarily to help them to be more effective in retail marketing which involved problems of representation strategy, that is to say, how many stations they should have in a particular area, locational strategy, service station design, layout, dealer development and training; and I was also deeply involved as a consequence of particular initiative I used there in the creation and establishment of major car care centers. Indeed the first car care center in America of the magnitudes of the kind we were talking about yesterday or Mr. Harvin was talking about yesterday were established by (T. 197) Mobil Oil Company, the first one in

Cherry Hill, New Jersey designed primary to specifications that I laid out at that time, both the operating specifications and the strategic purposes.

Q. When you were advising Mobil, for example, about station numbers, did you have a general view as to whether or not there was an overabundance of stations or too little stations or in general now in retail marketing of petroleum product or didn't you hold to any such view? A. No, I held no general view with respect to that as far as I can recall.

Q. What did you do for Exxon and when? A. My work with Exxon was very limited. It occurred at the time of the embargo in 19–in November of 19–the OPEC embargo in November of 1973 and it dealt almost exclusively with two things, one, the question of what Exxon should do in respect to its advertising policy since suddenly there was a greater demand than there was product available, should it advertise and if so, what, to the retail consumer; and two, we had rather extensive discussions confined to the most of about three hours to the question of what the future consequences might be of this OPEC embargo.

Q. Was that relative to future supply? A. The supply issue was certainly involved. It dealt with strategic consequences from the point of view of really (T. 198) service station types and locations.

Q. What was your view at that time regarding the effects of the shortage as it related to retailing? A. My views at the time were that the OPEC embargo could not possibly hold and that the shortage was likely to be short lived.

Q. And that had certain ramifications or effect upon retailing or– A. Since the issue was–since the question was what should be done in the future on the assumption that this kind of OPEC embargo should hold the fact that

my conclusion was that it would not hold either that it would not hold or other sources of supply which I knew at the time were already on their way would—well, would be stimulated as a consequence of that since the conclusion was that it would not be a chronic shortage caused by that, then the question became moot as to how to react to it.

Q. In other words, do nothing, just keep things going as they are, is that your suggestion? A. In respect to that particular question and that was really the question.

Q. What about for Sinclair? A. For Sinclair I was involved for a couple of years and I did rather extensive study, ended up to about two or three (T. 199) hundred page report with a great deal of looking at data and a great deal of field work dealing with ways of improving their marketing activities which covered the whole range of—

Q. Excuse me, what period of time was this? A. That was roughly between '65 and '66, I sus—I think it was probably about '67 and '68.

Q. Well, which one, '65 or '67 to '68? A. I think it included 1967 and '68.

Q. What were your recommendations to Sinclair? A. —

Q. The reason I asked is they're no longer here. A. That's right, they were acquired subsequent to that.

Q. All right, what were your recommendations? A. I'm afraid it's going to be a long lecture. It was three hundred pages.

Q. I'll withdraw the question. Did any of these consulting services that you rendered to either Mobil, Exxon or Sinclair, were any of them specifically directed in any way to activities in retailing in the State of Maryland? A. No, sir.

Q. Were any of them directly related to company owned and operated facilities? A. Yes, sir.

Q. Which ones? In Maryland now? (T. 200) A. No, sir.

Q. What did you do for Meadville Corporation? A. I consulted with them on the issue—on two issues, one dealing with their representation strategy whether they should or should not increase the number of retail stations in given communities because as you know, Mr. Woodstock, they have a strategy of very limited representation in any market that's spread over a large area. Two, if there were a change, what the investment policy should be with respect to land and buildings because they become more—everything has raised everything obviously.

Q. I believe you said they have a current association with Hess. A. They do.

Q. What type of association? A. Hess is a minority owner of the company now.

Q. Minority owner? A. Yes, sir.

Q. Saveway to your knowledge owned by any producer or refiner? A. Hess is a—

Q. That's a minority owner, isn't that what you just said? A. Yes, I thought you asked whether—

(T. 201) Q. But Meadville Corporation I imagine is still a parent with a majority, is that correct? A. Yes, sir.

Q. Is Meadville Corporation owned by a producer or a refiner or is Meadville a producer or refiner? A. Meadville is partially owned by Hess. In the stipulation of facts—in the pretrial order on Exhibit B to which I believe you agree—

Q. I'm asking you about— A. —is listed as a refiner.

Q. I'm asking you about your knowledge, not—is your knowledge—A. That is my knowledge.

Q. —based on the pretrial order? A. That is my knowledge, sir. I'm sorry I didn't mean to include that part. It is knowledge.

Q. I believe you also testified on direct that you've never appeared in a court room before, is that correct? A. That's correct.

Q. How about—have you ever appeared before any legislative bodies? A. Yes, sir.

Q. Let's start with the federal scene, have you appeared before Congress? (T. 202) A. No, sir.

Q. State? A. One.

Q. Which one? A. I appeared before a legislative committee of the State of Massachusetts last February at a hearing.

Q. What was it about, do you recall? A. The hearing was about the question as to whether there should be legislation prohibiting integrated all company ownership or retail—retail operations and I was asked to do that because they had heard that I was doing a study of this down here so I appeared for a maximum of I suspect ten minutes.

Q. Did you do that for the benefit of the Legislature? A. No, sir, I was asked to do that by the Massachusetts Petroleum Council.

Q. Do you know who that's made up of? A. Massachusetts Petroleum Council is a trade association whose members I think are primarily petroleum refiners.

Q. And they would have been affected by this legislation, is that correct? A. Yes, indeed.

Q. To what extent?

(Court) Mr. Woodstock, is this going to (T. 203) help us in this case

(Mr. Woodstock) I believe it goes to the credibility of the witness, Your Honor, and then to his testimony as to divestiture—

(Court) His credibility? You mean you don't believe him?

(Mr. Woodstock) No, Your Honor, I think I'm just trying to find out if—and we'll also seek in other lines of questioning to see if the witness and his expert opinion is somewhat perhaps number one, against government regulations and interference whatsoever with the economy; number two, whether he is major oil company oriented or large company oriented.

(Court) Well, surely if he only appeared before one Legislature, it can't be too serious along those lines, but let's move along, please, sir.

A. Mr. Woodstock, I've been asked numerous times to appear before all kinds of legislative and court hearings; and I've just assiduously refused to do so. The only reason I agreed to do it here is because this is some industry I knew a lot about because I've been around it for twenty years and I felt pretty strongly that what was about to be done was idiotic.

Q. Are you receiving a fee from Exxon and Continental (T. 204) for your testimony to us? A. Yes.

Q. What's the amount of the fee? A. The fee is sixteen hundred dollars a day.

Q. How many days— A. It's standard—which is my standard fee.

Q. How many days have you put in so far? A. Let me see. Estimate, that's all I can give you. I don't have the record. I don't remember what it is. I'd say probably over twenty—twenty-five days.

Q. Twenty to twenty-five days. A. I'd say that's probably minimum.

Q. I think you also testified on direct examination that in particular—for particular research of the Maryland market you were travelling or—in and around Maryland for three days. May I ask you what specific data or notations that you observed or made? A. Yes, sir.

Q. About the market. A. I obviously saw the visible externals and I made some specific efforts to see what pricing practices were, see what the mix of retail offers were by stations of a great variety of strategies, to talk to dealers and operators.

Q. How many–how many dealers did you speak to? I think (T. 205) you said six or– A. No, I think it was eight to ten. I think that's probably minimum too.

Q. Well, how minimum? I mean– A. I talked to at least eight to ten.

Q. You're familiar then with the contents of the pretrial order and consequently I'm sure you know there are at least thirty-seven, nearly thirty-eight hundred service stations in the State of Maryland. A. Yes, sir.

Q. Do you think by talking to six or ten dealers you're accomplishing anything about finding anything about the retail market?

(Mr. Noonberg) Objection.

(Mr. Woodstock) Your Honor, the question is saying–

(Court) Well, I'll let him answer it. Go ahead. That's right, let him answer.

A. The answer is yes.

Q. What specifically do you gain from talking to perhaps six or ten out of three thousand? A. As I've indicated, I've done very intensive studies of the industry in lots of different locations, all–as you can see from the publication, all over the midwest and the east so I don't have to invent gravity each time I analyze the (T. 206) situation having invented it once before, not that I did, but this is a matter of confirmation and understanding of some things that I may have already known. There are sufficient similarities in patterns of retail activity in all trades that what one wants to do is make sure that there aren't any unique differences in one area to the other and to understand those differences if there are;

so in part this was an attempt to examine the present situations at one location to determine how different, if different, it is from other situations and to analyze what specifically is going on if there is differ–there are differences. For example, I noted an extraordinary range of retail prices even among major brands in close physical proximity to each other.

Q. Excuse me, Dr. Levitt, I think my question–

(Mr. Noonberg) Let him answer–

Q. –is directed to what you gained from speaking to six retail dealers. It was not about the physical observations– A. I gained in knowledge of the fact that there is a wide range of differences in retail prices among major brand outlets in close physical proximity to each other, much wider than the ranges that I had observed in the studies that I had made and that I published as you can see, based upon data in the 19–latter part of the 1950s and much wider than the range that I had observed even in the 19–then later in the (T. 207) 1960s among firms with similar marketing strategies. I observed a clearly some competent and aggressive price oriented marketers in Maryland, as evidenced by BP and Redhead and Crown and a wide range of others. That combined with the data that I had previously gathered gave me some indication and based on my previous knowledge as to what might explain those continuing successes. I made considerable effort to find out what the supply situation was, where did crude come from, how it is transported into Maryland, from what–what those volumes are, how they transported within the state and from without the state into the state, see how those relationships were and how those things differ as between a major metropolitan area like Baltimore and more distant and somewhat more rural area like Cambridge.

Q. Once again I'll ask—try again. What did it accomplish, what did you gain from speaking to six to ten dealers out of possibly thirty-eight hundred? Are you trying—is it your testimony that speaking to six to eight dealers in Maryland out of thirty-eight hundred that you view what they said would be consistent in confirming findings that you found on a survey and investigation of over six thousand outlets in 1959?

(Mr. Noonberg) Objection, Your Honor, I think he's answered the question.

(T. 208) (Court) I'll let him answer it.

A. First of all, I did not say six or eight, sir. I said at least—I said eight to twelve—eight to ten that would be minimum. That's twenty-five percent more than between six and eight. Thirty-three percent more actually, but I didn't come all this way—

Q. Please answer my question. A.—to play games obviously; but I feel competent as one who did indeed as you say study six thousand in rather detail and who continued to do work of that kind of quality and objectivity that's reported in the REVIEW OF ECONOMIC STATISTICS which is the publication of the Economics Department of Harvard University which is very high standards for scholarly quality, that I feel competent on the basis of all those years that the kinds of work that I did insofar as direct information is concerned plus the work that I did on the basis of researches that had been done in Maryland, materials that have developed in connection with Maryland that I had an understanding of the Maryland phenomenon and discussions by the way that I've had with six members—six executives of the Exxon Corporation.

Q. All right, let me— A. That—that I'm so confident I know what I'm talking about.

Q. Based on what eight to twelve dealers told you they— (T. 209) that confirmed in part what you previously—

(Mr. Noonberg) I must object. That's not what he said.

(Mr. Woodstock) Well, that was the question, Your Honor. I would appreciate if the Bench perhaps would ask that the witness—

(Court) I know that was the question, but we're just getting on and on and on and I really don't think it has too much of an important part in this situation. Let's move along, please.

Q. You've mentioned you've had conversations with six members of the Exxon marketing organization, is that correct? A. Yes, sir.

Q. What was the length and—length of these meetings? A. That involved, I think, roughly—that roughly involved about twelve hours, I would say, in some meetings I talked to individuals and some I talked to more than one individual at the same time.

Q. Will you tell me basically what you talked about? A. We talked about their perception of the Maryland market, what the dynamics were, what was going on, what the competitive realities were, what their problems were, what—how they operated, what their practices were, what the supply situation was and what the policies were.

(T. 210) Q. And you agreed with their observations? A. My object was not to agree with them. My object was to learn.

Q. Did you seek information from any other source other than driving around the state for three days and talking to twelve dealers to perhaps try to substantiate the information that the Exxon marketing people gave you? A. Yes, I examined a great deal of data that is commonly available.

Q. Such as? A. Well, take PLATT'S OILGRAM, for example, on supply data, published data on the supply—on the stock prices, on who's quoting what prices the supply in. I examined data from the State's—State Comptroller's office and the State tax reports. I examined data on market ranking position and supply conditions, by the Lumberg organization, data by the way that is just not episodic at any given point of time. It's a question of data over a long period of time.

Q. Would NATIONAL PETROLEUM NEWS be included in those materials or OIL DAILY? A. NATIONAL PETROLEUM NEWS data to the extent that they apply to the Maryland situation because as you know they quote certain pricing data by terminals and you have lots of terminals here.

(*T.* 211) Q. Same would be true for OIL DAILY? A. I did not examine OIL DAILY for that purpose.

Q. Beyond those, would it be your testimony it's very hard to acquire any other data on the oil industry beyond those sources, is that correct? A. No, that's not correct at all. The FTC—

Q. Other than— A.—publishes innumerable data and there are all kinds of studies. It is one of the most heavily documented industries in this nation.

Q. Other than the government, as you mentioned the FTC, perhaps the Department of Justice— A. Oh, there are numerous academic studies. You've just referred to one of them.

Q. During your direct examination you gave us the definition of the retail offer and I believe I'm correct. I understood a big part of that definition was that there was a large variety, the mix, the numbers. Would part of your definition of the total retail offer be that—should—there would be a large number of competitors? A. I don't understand the question. Could you clarify—

Q. Well, maybe if you would just give me a very again brief definition of the retail offer. We don't have—I can't have (T. 212) it read back at this time because we don't have that type of a recording system. A. The retail offer refers to that mix of goods and services and the way in which they are supplied, the conditions under which they are supplied, the hours, the practices that would define the detailed environment, includes price, includes station hours, includes product mix, includes quality of the product mix, includes quality of the generic product itself, includes quality of the services, it includes location, it includes varieties of location; it includes types of design and layout of stations and of driveways, like everything which could conceivably affect the way in which consumers behave or affect their choice of where they are going to give their patronage.

Q. Take price within that definition, the range of prices. Would it be your opinion that the more individual price makers you have in a given market that the—generally the greater the price range will be? A. I don't think that necessarily follows at all. The greater the price range, it might follow although I think that's a function again of the industry and of the geographical areas that's published. It can cover a wide geographic area where there are differences in consumer access to those sources of supply, then you may have a wider range than if (T. 213) consumers had equal access to those sources of supply so depending on the geographic area I think to some extent; and it also depends on the nature of the commodity. You know we've got innumerable wheat farmers and we've got one wheat price at any given time.

Q. Does the same hold true for the gasoline? We have innumerable gasoline dealers. A. I know that's why I said—

Q. Does that mean you have to– A.–it depends upon the product category and it depends upon consumer access; it depends on the communication system and depends upon the nature of the product.

Q. Let's talk about pricing in the gasoline market. Would it be your testimony that the major oil companies–would it be your opinion now that the major oil companies when they distribute their product through independent dealer losses that they have no control over the actual retail price posted? A. Correct.

Q. Correct and consequently if you had, hypothetically let's say, a thousand dealers–well, better yet let's say fifty dealers, oil company would have no control on the retail price they posted, hypothetically you can have fifty different prices, is that correct? (T. 214) A. That's correct.

Q. If you take those fifty dealers– A. At any given time.

Q. At any given time. A. Five minutes from then, you might have a hundred and fifty prices.

Q. You take those fifty dealers out of the market, you replace them with fifty company owned and operated service stations, have you eliminated fifty price makers? Potential price makers? A. You have eliminated fifty potential price makers.

Q. And what if you–have you replace them with one? A. Yes, sir.

Q. Haven't you then reduced the number of competitors in that market? A. No, sir.

Q. I don't understand. A. Well, take–

Q. Haven't you– A. Exxon has thirty-six different company-owned stations. They don't have thirty-six–they don't have one price.

Q. Who sets the price? A. The price–

(T. 215) Q. Please answer my question. Who sets the price at goods and services sold at Exxon company-owned and operated service stations? A. It is not set by a single individual.

Q. Is it set by a single entity?

(Mr. Noonberg) Let him answer the question, Mr. Woodstock.

A. It is set by some perception of the competitive realities that face the particular station at the particular location. That's why you have different–but if they had–listen, if anybody had his choice, he would have the highest possible uniform price that he could. The seller doesn't have the choice, that's the whole point.

Q. Dr. Levitt, I'm asking you does the final decision rest with Exxon Corporation as to what the price will be at goods and services sold at their retail service stations that they own and operate. Yes or no, I think is– A. There is also a third answer and that is I don't know.

Q. You were in the court room yesterday, am I correct? A. Yes, sir.

Q. There was testimony by the Exxon marketing official that Exxon, one of the benefits to be gained by company owned and operated service stations, in fact you yourself testified (T. 216) this morning that one of the reasons you should have company owned and operated stations is that you can control the whole operation. Part of that control as testified by the Exxon executive yesterday is control over the price of the product– A. You're talking about specific price, sir, not about–I'm talking about the level of prices and there's quite a distinctive difference.

Q. I– A. That is why, for example, if I may answer, that is why there are such–why there are differences between those thirty-six stations.

Q. I'm asking– A. I'm not suggesting–

(Mr. Woodstock) Your Honor–

A. I'm sorry, sir, excuse me.

(Mr. Woodstock) I'm on the verge of becoming argumentative and–

(Court) Well, I noticed that.

(Mr. Woodstock) Well, I would respectfully request the court to instruct the witness to answer my questions and then if he'd like to explain–

(Court) Well, I think he is trying to do it, but you're starting to argue with him, so let's try to (T. 217) ask specific questions and let's see if we can't get the answer and let's move along.

Q. At Exxon company owned and operated service stations with whom would the final decision lie as to what price goods and services are sold? A. Excuse me, can I get a clarification? Are you talking about Baltimore or Maryland?

Q. Okay, let's confine it to Baltimore, Maryland. A. I cannot answer it with absolute–cannot answer that question with absolute certainty.

Q. So it's your testimony you don't know who sets the prices at Exxon car care centers or company owned and operated service stations? A. Who is a very complicated word.

Q. I'm asking you if it's Exxon Corpor– A. Talking about a single individual, you talking about a committee? Are you talking about–I really don't know.

Q. I'll rephrase the question. A.–think it so easy. You understand I'm not trying to be evasive, sir.

Q. Are goods and services sold at Exxon company owned and operated service stations throughout the State of Maryland, throughout the nation, are those prices set by Exxon Corporation, (T. 218) employees of Exxon Corporation, agents of Exxon Corporation or are they set

by some independent individual who is in no way paid, controlled or in any way under the direction and influence of Exxon Corporation? A. They are set by someone who is an employee of the Exxon Corporation.

Q. Thank you. Is that different, significantly different than the situation where you have fifty independent businessmen and you've previously testified to the company having sold them the products, would then post–be free to post their own retail price? Now is the dynamics of that situation different? A. I would certainly think that it is different.

Q. And haven't you in fact reduced the potential number of price decision makers where you replace fifty dealer leasees with company owned and operates stations? A. You have reduced that number although not necessarily reduced the competitive vigor of the outcome. Prices could conceivably be lower. The price decision making practices could be more informed. The strategy could be much more oriented toward being a price marketer or a less oriented price marketer, whatever you will; but the managerial contents in the decision maker is the critical factor here. It's not necessarily the number, the absolute number although (T. 219) I will grant the absolute number has something to do with the outcome, but it's the managerial competence, its strategies, the decisions that they have decided to make as to exactly what it is that they want to do and how they want to compete, it's the information that they have available regarding the realities of the marketplace at any given price, –any given competitive zone or competitive area that are critical. It may very well be that single individual is much more profoundly and better informed about the competitive realities in the market than fifty people–a good thing is not necessarily multiplied–increased by its multiplication.

Q. Continue our hypothetical further, every major oil company doing business in the State of Maryland who are listed in the pretrial order which you reviewed eliminated dealers even just by fifty percent or twenty-five percent, wouldn't that significantly reduce the number of price decision makers posting of price of the ultimate sale of gasoline to the citizens in the state? A. It would reduce them if the policy were that the managers of the station though employees are not—does have any price discretion, if that were the policy, it could conceivably be that the policy—the managers are to have it, but you're right is the policy where the decision is to be made elsewhere than in the point of sale, it seems just quantitatively (T. 220) reasonable that there would be fewer.

Q. Are you familiar with the term "predatory pricing?" A. Yes sir.

Q. Would you define that for me? A. Predatory pricing—may I say my answer is probably going to be more economic than maybe legal, sir.

Q. Well, I'd like for you to make it quasi-legal, economic— A. All right.

Q. —in the context that you were advising me and I wanted to know what you think an economist in relationship to the anti-trust laws. A. It's pricing practices whose purposes are the illegal destruction of competition.

Q. Included within that destruction of competition would there be— A. Which would tend to—

Q. —specific competitors or identifiable actors? A. Excuse me.

Q. Within that you said destruction of competition, I'm asking you within that competition would that include indentifiable actors, competitors? A. I suspect yes, of course.

Q. Now assume if you will, I'm an evil man and I want (T. 221) to engage in predatory pricing. I have two

methods of distributing my product. Firsthand, I have a thousand people out there to whom I sold products and then they are free to resell it at any price they want. Okay, and next to each one of those thousand distributors is a competitor of mine. The only way I can distribute my product is I can do it myself and my whole purpose and aim and desire is to drive that man out of business because I've got a larger war chest than he does and I know we want to battle it out on low prices, he's going to lose. Now assume again and I know this may be a lie but morally you could give me an independent advice as to which way I could be most successful to accomplish my predatory purpose by which means of marketing my product and pricing it would you advise me to adopt?

(Mr. Noonberg) Objection, Your Honor.

(Court) What's the objection, Mr. Noonberg?

(Mr. Noonberg) The premise of the question suggests that the direct violation of Maryland and federal law and is an improper assumption I think.

(Court) It sounds as though it would be directly contrary to Robinson-Patman, Mr. Noonberg.

(Mr. Woodstock) Your Honor, in response to that, I would say that there's cases after cases of predatory pricing on the law books in which actors in the marketplace (T. 222) actively engage in doing this.

(Court) Yeah, and they're subject to treble damages, too, aren't they?

(Mr. Woodstock) Well, that—

(Mr. Noonberg) As well as criminal prosecution, Your Honor.

(Court) That's right.

(Mr. Noonberg) Under state and federal law.

(Court) I don't know that we can assume that the oil companies and that's who you're driving at obviously

are going to knowingly set out to violate the criminal statutes. I would think it would be very unwise of them.

A. That would have been my advice. Don't do it.

(Mr. Woodstock) The question is—was directed to the mechanism and how one—

(Court) All right, I'll sustain the objection.

Q. Again comparing the two methods of distribution, if I wanted to in some way focus my pricing activities to meet that of a competitor's pricing activities, would direct operation or dealer operations be more effective and more efficient to me to in fact focus my attention and my ability to respond?

(T. 223) (Mr. Noonberg) Before you answer it, could I just ask Mr. Woodstock to give a definition of what he means by competitors? Competitors of whom? Competitors of the supplier or competitors of the retailer? I don't understand that.

(Court) Rephrase your question.

Q. Assume if you will have a—a typical Maryland market where you have major oil companies competing through dealer lessee stations and some of those dealer lessee stations and some of the majors are getting dealer aid from their supplier and reduce their price significantly, three cents below me and I'm the other major that you're advising, and I want to respond to that. Now understand I'm going to put a little qualification on this, okay, they haven't uniformly dropped their price, those dealers that are getting the aid from their supplier, but in one quadrant of my imaginary marketplace they have and it's three or four cents below me. Okay, could I have reason to believe that my competitor's giving support to everybody and I asked you how I could best respond to that price reduction. I currently have an equal number of dealers out there and I tell you as part of the facts that I don't imagine that the situation is going to change. I

believe this supplier is going to keep doing that. Would it be wise for me to give a temporary price reduction to my dealers even though this may continue now for a number of years (T. 224) or would it be more efficient for me to have direct run operations which I control the price and could thereby focus my response on that one quadrant?

(Mr. Noonberg) Objection.

(Court) What's the objection, Mr. Noonberg?

(Mr. Noonberg) I think the question, if I understand it, relates to what Mr. Levitt believes is wise and I don't think that's a proper question for Mr. Levitt to be asked. In addition the issue of price supports is not one which Mr. Levitt discussed in his direct examination and, of course, is not a part of the litigation before you at this time.

(Mr. Woodstock) Your Honor, the man is an economic consultant. Exxon has offered him as an expert, he's an economic consultant to the marketing of petroleum products. My question involved an historically used pricing method which the court has sustained as being legal and also it involved the method of operation which is specifically going to be prohibited by the statute. I've also clarified the question to include what Mr. Noonberg's previous objection was to identify the people in the hypothetical as being supplied by a competing supplier. Now beyond that I'm a little bit at loss as to how to phrase the question and also—

(Court) Well, probably what his advice would be.

(T. 225) (Mr. Woodstock) I believe that's what I asked you. What would you advise me as a consultant?

(Court) Do you have enough information to go on to form a conclusion, Mr. Levitt? A. I have, Your Honor, I think enough information provided I think that it is understood that we're talking about a rather broad general situation and not specific—

(Court) Certainly, go ahead.

A. The question used the phrase efficient—what would be the most efficient plan.

Q. And I'm talking of cost efficiency demand. A. Precisely and the most efficient way, it seems to me, would be to do it in the former rather than in the latter of your two alternatives, and that it is to respond to the situation in the given competitive area by offering allowances in those areas because the response to those areas, in response to competitive situation in that area. Where you understand by efficiency, as you say, cost efficient. There are prices and costs that come with operating as we've described before dealer full service retail service stations on a selier, company operated basis. They could not function on a seller and operative basis—on a full service basis. Indeed if they could and if the oil companies felt that that would be the most efficient way it was doing—that to operate there was (T. 226) nothing in the world now which prevents them from operating them as salaried owned—as salaried stations. The reason they don't operate them as salaried stations because precisely it is more efficient given the mix products the consumers want out of those full service stations to operate them on a dealer basis. There's every incentive in the world to operate them on a company basis except one and it doesn't pay.

Q. Don't they in fact market—operate conventional service stations on a company basis in the State of Maryland, some actors that you're familiar with? A. Six point seven percent of their stations.

Q. Are conventional stations? A. No, no, not conventional, oh, substantial larger—smaller proportion of those. It's—it's twenty-two out of five hundred and thirty-two conventional stations.

Q. Are you speaking of Exxon only now? A. Yes, sir.

Q. Are you familiar with Phillips Petroleum in the State of Maryland? A. Yes, sir, not in the same detail as in Exxon.

Q. Do you know what type of operation they have? A. They have a mix.

Q. Yes, they do. Are you familiar with the number of company stations that Phillips has?

(T. 227) (Mr. Noonberg) Well, if you're testing him about the—

(Mr. Woodstock) No—

(Mr. Noonberg)—facts in the pretrial order, I think he ought to have it in front of him. It's all spelled out in the pretrial order. I don't think you're entitled to test his recollection about the specific numbers.

(Court) No, I would think you would give him a pretrial order. Otherwise all you're doing is testing his memory as to how well he remembers a pretrial order.

(Mr. Woodstock) Your Honor, the question is going to eventually lead to the method of operation by Phillips and they have company owned and operated stations.

I'll withdraw the question.

Q. I'd like you to, a little bit more brief perhaps, run me through without the examples, run me through the wheel of retailing theory again that you explained on direct examination; and I'd specifically like you to limit it to as it applies to retailing of petroleum products. A. I said the retailing—the history of the retailing of petroleum products is a history which is very similar to the history of retailing phenomenon in lots of other products and that is you have a new institution created. As you know, the first retail service stations tended to be a store front, (T. 228) grocery stores with a gas pump in front of them because they were single—the number of cars on the road increased and those early days when the service

requirements were very high because you had flat tires every four miles and all kinds of other breakdowns, it became obvious that in order to keep the cars moving—in order to keep the cars that you wanted to sell gasoline to moving, you had to have an institution which would keep them moving and that's how the service station started; and nobody put any money into it because nobody had any faith and the oil companies strated their own; and that's why the original petroleum gas stations as we know them today, the service stations, are company operated; and it was not until 1932 with the passage of the chain store act in Iowa—chain store acts all over the midwest that the oil companies moved in the direction of having company operated stations; and it turned out there was actually a movementt for the direct—in that direction anyhow I guess about, oh, twenty percent of them were affected anyhow. Well, it was an evolution is what I'm trying to suggest in the servicing. Now what happens is as a car's life is extended, as the frequency of repair requirements is less, as the quality of the products that the—the generic product, namely gasoline, becomes increasingly the same because the automobile demands and engine demands become (T. 229) increasingly the same, what you find is many, many fewer customers feel that they need to deal with stations that provided the total mix of services, and as they just respond entirely to price thinking that many of the products, the gasoline products from the different brands are identical or sufficiently similar to take very little risk in getting them from different places and so they go for single—they become very price responsive and that's where that new institution came from; and that's very similar to what happened in supermarkets, very similar to what happened in department stores, very similar to what happened in mass merchandising.

Q. Well, let me take you back to the beginning of that wheel. We had nobody would put money in so the major oil companies built their own stations and operated them. At what point in time as the wheel turned, did you get these innovative marketers that you've mentioned when you were first describing your wheel of retailing, the spur lines I believe you said that type? A. Oh, those came mostly in the early 30s—there were a few of them around in the early 30s. We began to see quite a lot of them in the latter part of the 1930s and great explosion of them after World War II.

Q. In the beginning the true innovators, were they producer refiners or were they just non-producers and refiners (T. 230) like you and I? A. The true innovators were the guys who created the good service station in the beginning.

Q. No, I'm not talking about— A. —talk about, if you want to talk about that.

Q. Talking about the type of marketer that came along— A. You mean the price setter.

Q. Right. A. All right.

Q. Those people and that wheel as it was turning, the wheel of retailing, the people that changed the style of marketing away from the— A. Well, they didn't change entirely. I mean in Maryland the private branders have twenty-four point eight percent of the market, and they just —the dominant form is still one of the major brand styles. The—these spur operations, those trackside operation where as—historically true retailing, by the way—

Q. I— A. People who are—from external to the central segment of the industry.

Q. All right. Why would you and I believe you testified that this wheel of retailing theory envision the things keep happening again and again. I imagine part of

this is (T. 231) this is what contributes to innovations in the market, is that correct? A. That is–

Q. And that certain trends– A. That is–

Q. –repeat themselves, right. A. That is.

Q. What makes you think that if there was a prohibition on company owned and operated service stations that these would not be displaced by this same type of independent retailer that came along back in 1930? A. I don't know what will happen. All I know is that you're impeding a sort of a natural evolutionary force. I–it has happened historically constant in the past. There have been these new firms that have been created, they have integrated backwards and become big firms. This sort of constant or as Schumpeter called it the perennial gale of innovations. It's constantly there. To intrude through legislation of some sort and says here is the form that evolution cannot take or here is some people who are to be excluded from the opportunity of providing the kind of innovations from entry from the kind of expermentation that I've talked about seems to me to be almost suicidal, to destroy one potential segment of consumer benefitting innovation without any visible (T. 232) benefit would be the opposite to the society. Obviously anti-competitive, it's obviously anti-consumer it seems to me on that basis. I don't see where you're going to come out in doing that.

Q. Well, would that– A. It simply shows that the opposite is going to–if you leave that particular segment, if you leave it alone, you've got lots of activity going on.

Q. Would that be your opinion as to any type of government regulation or law which required divestiture of integrated firms? A. No, sir.

Q. How about the Hepburn Act? Are you familiar with that act, sir? A. No, sir.

Q. Required–how about certain–CAB? A. Yes, sir.

Q. Are you familiar with any of their regulations– A. Yes, sir.

Q. –which prohibit air carriers from doing other things? Do you think that's a good regulation?

(Mr. Noonberg) Objection.

A. Well, don't–I do.

(Court) I think we're getting way out of (T. 233) the ball park now, Mr. Woodstock.

(Mr. Woodstock) Your Honor, maybe if we can break for lunch and I'll regroup my notes then and try to come back and clean this up.

(Court) I think that would be a good idea. We'll adjourn to one thirty.

Professor, since you're under examination, you may not discuss your testimony in any way with anyone involved in this case over the luncheon recess.

(Recess)

(Court) Mr. Woodstock.

CROSS EXAMINATION (Continued)

By Mr. Woodstock:

Q. Dr. Levitt, you're still under oath. I believe in your direct testimony you said with regards to Paragraphs B and C of the Act which is involved in this litigation that if it was put into effect, one of the things it would do, which would be adverse to competition, would be to erect barriers to new entry. Is that correct? A. Yes, sir.

Q. I believe you also pointed to the fact for evidence of your previous statement that on Luberg's list or Lumberg's listings there was approximately thirty-seven integrated companies of which only five operated in Maryland, is that correct? (T. 234) A. Yes, sir.

Q. Can you tell me if you have any direct information or evidence of the fact that any of the remaining thirty-two who didn't market in Maryland had intentions

of coming to market—to market in Maryland? A. Among those thirty-two I have no evidence. Among the remaining couple hundred, I think in the group three classes—categories, some are—

Q. But we're talking about— A. —in—are marketers only.

Q. —the thirty-seven that you identified in Lumberg. A. No, sir, I do not.

Q. Do you have any information relative as to why they never marketed in Maryland before this legislation was passed? A. No, I do not.

Q. It would be your testimony then that to the best of your knowledge, this law has absolutely no effect as to their marketing decision as of today, to not market in Maryland. A. To the best of my knowledge.

Q. May I ask your opinion please as a expert, economist and—how you feel about the effect of government enforced price controls as to how that affects the normal economic forces, for example, in the retail marketing of petroleum? And I specifically would like a response rather explaining (T. 235) whether it's a negative or a positive contribution? A. The current controls? The ones you are referring?

Q. Okay, you can work with those, yes. A. I think current controls clearly, you can read it in the trade press and speeches and you can infer it from other things, the current controls have tended to put a damper on any—on most new investment activity in the retail marketplace simply because of the uncertainty as to length and the uncertainty as to the stipulations—uncertainty as to their duration and the uncertainty as to the stipulation if they are extended.

Q. Would it be your opinion that the economy involved in the marketing of petroleum products would be better off without any government price controls? A.

Without any government price controls? Ah, you mean now or—

Q. I'll— A. Under what conditions?

Q. If I may, I'll narrow it down. With the present price controls as they would apply to the retail marketing of petroleum as opposed to crude oil prices. A. Well, let's tie it into crude oil prices.

Q. Okay, well, give me your opinion on both then.

(Discussion regarding being able to hear Mr. Woodstock).

(T. 236) Q. I believe we asked your opinion regarding the effects on retail marketing of petroleum prices at current price controls. A. The effects, I thought I answered that—

Q. Whether or not— A. I didn't—

Q. Whether or not it would be better off without them. A. Oh, whether we'd be better off without them. Well, I think so long as we've got the crude controls then—and the allocations in the—of crude that there might be some presumption because of the artificialities created under those circumstances, that you might be better off having some protection spelled in in the form of controls. They're sort of past the relations as you know, they're not controls in any absolute sense. There are numerous complex provisions regarding what can be passed on and what cannot so there's a great deal of flexibility in that, but the design of the flexibility is to prevent differential consequences based upon the fact of the existence of these crude controls.

Q. And would it be your opinion—well, let me ask you is there, in your opinion, a connection between the supply situation for crude oil which is ultimately refined and the ultimate price of gasoline that we've seen in the marketplace for the last couple months? A. I think there is.

(T. 237) Q. What would be the nature of that relationship? If I may, for example, suggest to you that if within the next six months the supply situation became much brighter and supply was available on a much broader basis at perhaps even a lower price. A. Crude?

Q. Crude. What would be the effect upon, the ultimate effect upon retail prices? A. I think you'd have some greater instability of retail prices as we already do, as you know; there is—there is plenty surplus product around now. All you have to do is read PLATT'S OILGRAM and look at the spot prices and you can see that there are surpluses now in products.

Q. Is the price the same as our domestic sweet crude? A. Price of what?

Q. At—the available refined product that's available on the spot market, is it somewhat equal in price as the refined product that comes from domestically refined crude? A. No, it isn't because the controls in the allocations are such as to prevent that.

Q. Is there a price difference? A. No.

Q. There's none because of the control. A. No, because of the makeup relationships in the (T. 238) allocation system.

Q. Without the equilibrium enforced upon the controls but prior to the controls were implemented— A. Well—

Q. —was there a difference between the domestic crude and the foreign imported crude? A. Insofar as what is concerned?

Q. The price of it? A. Of what, of the crude?

Q. Yes. A. Yeah, not all domestic crudes are the same, as you know.

Q. Right. A. Yeah, there were differences.

Q. Was it a substantial difference? If you know, if you don't know, tell me and I'll— A. By comparison of the

difference today, it would not be very substantial.

Q. Then is it your testimony that this availability of supply is also directly related to the ultimate price of refined product that's sold in the retail market, is that correct? A. Yes.

Q. You've testified to that? (T. 239) A. Yes.

Q. If the supply situation changed favorably tomorrow, would you assume that the prices could possibly go down, the retail market? A. Supply situation as well as the price?

Q. I'm asking you— A. Speak up please.

Q. —if more supply would be connected to prices. If the supply and the prices of supply went down. A. You have to do both because—

Q. Right. A. Because of the controlling situation. I—let me give you my best estimate if I can. Obvious I don't know what's absolute—

Q. I'd like your estimate— A. My best estimate—

Q. —with controls and without controls. A. Well, you're talking about without control, my best estimate is—well, with controls my best estimate is that we would not have the very substantial difference in general level of product prices now because we have for the increasingly in the last four, five, six months experienced product surplus and there's already been a very substantial variations—nobody now argues that there isn't enough crude (T. 240) around. Nobody now argues that there's insufficient product around and you can see that, what's happening in retail prices; so if there were a substantially more crude, I don't know, I don't think I would go very far in assuming that there would be a substantial reduction beyond what the surplus has already created. I don't know, that's a guess. We've already taken a lot out of it already.

(Mr. Woodstock) I have no further questions at this time, Your Honor.

REDIRECT EXAMINATION

By Mr. Noonberg:

Q. Dr. Levitt, just a couple of quick questions. You indicated in response to one of Mr. Woodstock's questions that the share of the market that the price marketers had I think you used and the term was twenty-six percent or something like that. A. Twenty-four point eight.

Q. Twenty-four point eight percent. Could you identify is that the Maryland market, the national market or what? A. That's the Maryland market and the source of the data is right in the pretrial order in Exhibit C.

Q. Well, Professor Levitt, what I was going to ask you next was are you aware of whether or not that percentage has increased or decreased over the last few years? A. Yes, in 1969 the independent—the price marketers (T. 241) market share was fourteen point two so in the matter of five years between '69 and '72, it's increased to twenty-four point eight which is a seventy-eight percent increase in the market share of price marketers in Maryland in the last six years.

(Mr. Noonberg) No further questions.

(Mr. Woodstock) I have a few.

RECROSS EXAMINATION

By Mr. Woodstock:

Q. Who would you identify on this list as price marketers? Is this the list you're referring to? A. That, sir, is the list. Ashland, all of those stations are price marketers, BP, the Coastal States which supplies Crown.

Q. Excuse me? A. Which supplies in part Crown, gets its supplies from others; Hess, Louisville, Southern States, Tenneco and Multiple Sources. I think you will find if you add up the 1969 numbers for those and 1975, you

will get fourteen point two in '69 and twenty-four point eight in 1975.

Q. Dr. Levitt, based on your familiarity with the Maryland market, how many service stations does Tenneco have in the State of Maryland? A. Excuse me, what do you mean by have, sir, may I have a clarification on that? Branded under the Tenneco brand you (T. 242) mean?

Q. Yes. A. I think that's in that Exhibit B.

Q. Yes. How many are there? A. Zero according to this.

Q. Doctor, based on your knowledge of the Maryland market, how many service stations does Coastal States have in the State of Maryland? If I can find it, I'll let you look at the list. A. Coastal States has zero.

Q. How many does Louisville Refining have? A. Zero.

Q. Do you have any idea based on your knowledge of the Maryland market where the gasoline that's taxable on a first sale basis you've identified as sales goes to or how it's dispensed ultimately to the consumer in the State of Maryland? A. Yes, I do.

Q. Where does Louisville's gasoline get sold from?

(Court) Well, didn't he say that Louisville just had no stations in Maryland?

(Mr. Woodstock) Yes, he's testified as to the effect of sales in Maryland, Your Honor, and I believe that it carried the inference that these were sales to the consumer and this man has—he identified the people as price marketers. (T. 243) Well, they may be price marketers in the sense that they're wholesalers. They may not be price marketers. The concept of a price marketer has previously been identified by this witness as one who sells at traditionally a lower price than the retail market or under the major—

(Court) Well, if the company that he's talking about has none, then why should it be material as to where it gets its supply?

(Mr. Woodstock) Well, it's significant—well, if that's included within the percentages of price marketers' sales, then it's not—he cannot trace it to ultimate sales to the consumer, it shouldn't be classified as within that percentages of price marketer sales.

(Court) Well, I still don't understand why it's necessary to ask him where it gets gas from.

(Mr. Woodstock) If I may—

(Mr. Noonberg) If Your Honor please, I think I can explain this somewhat. The witness testified that according to Table C the share of the price marketer has increased over the last five to six years.

(Court) That's right.

(Mr. Noonberg) Mr. Woodstock has converted that question into asking whether suppliers had retail stations, but the supplier may not have a retail station such as Tenneco (T. 244) does not have a retail station but it supplies and sells to those who are price marketers and that's why the relationship that I expressed to you in this—at the opening statement, we can't get the exact numbers because they're just not available, but the best information is we know, for example, or Professor Levitt knows who Tenneco sells to or who ultimately gets these products and they are the ones who are classified as price marketers.

(Court) Well, I guess I shouldn't have asked the question because it's taken up more time than it's worth; so go ahead and go back.

Q. Is it your understanding, Dr. Levitt, of the figures of percentage of taxable motor vehicle fuel sales in Maryland by oil companies that every sale recorded on

here resulted in product being distributed to consumers in the State of Maryland? A. No, sir.

Q. Do you have any idea how many of the gallons of gasoline that these percentages indicate were subsequently transported out of the State of Maryland? A. I know the classifications are consistent between 1969 and '75, and I think that's the matter that counts. There are different data, the Lumberg data, which do it a different way but these Lumberg data have not been submitted (T. 245) and you've not certified to those facts so I didn't want to produce them. It's substantially the same. The Lumberg data gives you a percentage increase which is almost the same. The Lumberg data percentage increase is about sixty-eight percent versus that number being seventy-three percent so it's very close, consistent I think it seems to me.

Q. Upon what does Mr. Lumberg base his information, his factual information? A. Lumberg heavily does telephone interviewing, asking people what brand they bought last time.

Q. That's his primary source of sales data from the respective— A. Sales—all you have to do is get purchase data, consumer purchase data and you ask somebody what did you buy last time and they say I bought Crown, that's the best indication of what brand they bought as opposed to looking it up in the sales records.

Q. Are you aware of Mr. Lumberg's Share of the Market Reports? A. Yes, sir.

Q. What do those reports reflect with regards to the data contained therein? A. He—reports—there are different kinds—different kinds of share of the market. He lists the same ones that (T. 246) you have here. He also developed some bas—he also developed share of market data on the basis of not on tax rolls but on the basis of telephone interviews.

Q. Where does he obtain his primary information as opposed from secondary information? A. Telephone interviews.

Q. To the best of your knowledge as an expert on oil marketing, does Mr. Lumberg in any way use and obtain taxable–percentage of taxable motor vehicle fuel sales from the various states? A. Yes, he does.

Q. Does he do so from Maryland? A. Yes, he does.

Q. Does Mr. Lumberg purport in his use of those figures to be able to–to be able to account for every gallon of gasoline within those first taxable sales that it's being sold within that particular state for which the taxable sales is reported? A. Can I explain exactly the difference? Mr. Lumberg does not presume that the two are identical. He does not presume that the market share of any given reporter of tax revenue is represented by the volume on which he paid taxes in that state, that the volume–he doesn't presume that. That's why he really reports two different data. He reports (T. 247) the data based on these and reports data on telephone interviews, it is a very common way of getting market share data, which has what people actually bought, here is what the taxes would be. Those two things will always be different for precisely the reason we indicated. Some of it gets shipped out of the state and some of it gets shipped in internal ways that we're not aware of. Some of them are not even sold as retail. Some of them go to industrial users, some of them go the runstruck fleets, some of them go for farming funds and not to the retail consumer. So that's why those differences exist; and one of the reasons, I'm not entirely sure why all the reasons as he makes those calculations, I think there's some interesting, useful data that for purposes of internal management companies who want to know what those numbers are and he's just a handy way of collecting those

numbers from the state tax rolls because it's cheaper for a company to pay one person to collect them for all rather than each one of them trotting to the State House and collecting them separately.

Q. One last question. Are you able to look at that document and state under oath that every–

(Court) Now that document, identify it for the record. Table C, sir.

(Mr. Woodstock) Table C of the pretrial order.

(T. 248) (Court) All right.

(Mr. Woodstock) And it's the Taxable Sales Reported by the Gasoline Sales Tax Division.

Q. Are you able to state that all of those taxable sales and in particular those by the companies you identified resulted in sales by price cutters–by price cutting or price competitiors within the State of Maryland? A. I can say with a high degree of confidence that the overwhelming proportion of the product from those five sellers goes into that segment of the retail gasoline market which uses price as its major competitive weapon.

Q. And on what is that based? What information would that be? A. This is my–based on my studies.

Q. What studies of the Maryland market and Maryland taxable sales? A. You'll recall that I've indicated earlier I had among my discussions with people here in Maryland I discussed supply situations, determine who sells what to whom and on the basis of those discussions and in the–on the basis of those discussions and indeed on the basis of my past experience knowing something about the marketing strategy of these companies particularly in themselves, I know, for example, what generally the marketing strategy of Tenneco is, generally (T. 249) what Ashland is and generally know the BP operations–on the basis of those things, the information I got from Maryland sources as to where their product went was

consistent with what I know about their particular strategy.

Q. Can you give me a round figure, if you would, of the number of terminaling and exchange agreements that are in existence by just the Plaintiffs in this case that are on file with the Gas Tax Division of the State of Maryland? A. I have no idea.

Q. Do you know what an exchange agreement is? A. Yes, sir.

Q. And a terminaling agreement? A. Yes, sir.

Q. You have no idea how many of those are right now on file being utilized in the State of Maryland? A. No, I don't.

(Mr. Woodstock) No further questions.

(Mr. Reid) May it please the court–

(Court) Mr. Reid

(Mr. Reid)–name is Richard Reid. I represent Petroleum Marketing Corporation and Commonwealth Oil Refining Company. Could I ask a question, the witness a question?

(Court) Yes, sir.

(T. 250) CROSS EXAMINATION

By Mr. Reid:

Q. Dr. Levitt, you testified that the price marketers in the State of Maryland are twenty-four point eight percent of the market, I believe? A. Yes, sir.

Q. And then you were asked who make up that–

(Mr. Preston) You read from this list which is C.

Q. Who made up the price marketers and I didn't hear Petroleum Marketing Corporation named which sells under the Scot brand. Was that just an error on your part? A. Exhibit C does not include–most of that source my understanding comes from Commonwealth. Petro-

leum Marketing Corporation comes from Commonwealth Refining and that's not on this table.

Q. Petroleum, excuse me Petroleum– A. No, Petroleum Marketing is on this table, right.

Q. Correct? On the table. A. Yeah, as a matter of fact, that–that–you're quite right. I neglected that. That's twenty-one point–the twenty-four point eight includes Petroleum Marketing.

(Mr. Reid) Thank you very much.

A. Yeah, it does, clearly does.

CROSS EXAMINATION

By Mr. Preston:

Q. Let me ask you the same question with regard to (T. 251) Continental, Professor Levitt, who, as you know, market only Kayo at retail here in Maryland. A. Yes, sir.

Q. Does it also include that? A. Yes, sir.

* * *

By Mr. Greenwald:

(T. 255) * * * We propose to offer the expert testimony of Dr. Charles H. Berry, who is a professor of economics and public affairs at both the Department of Economics and the Woodrow Wilson School of Princeton University. Dr. Berry has had a long and I might say a distinquished career as a consultant with a view toward viewing the impact of a variety of programs, certainly not limited to the petroleum industry upon the consumer. His essential outlook is how does a given economics program affect the consumer. That's what he as experienced and practice and that's what he has taught; and you will hear from him some of the courses that he teaches which emphasize the tools of the professional economist engaged in how a given program act upon the consumer. Now Dr. Berry will offer an interesting contrast to Dr. Levitt whom you have heard earlier. Dr.

Levitt was able to offer to the court an incisive kind of analysis based upon expertise in the marketing specifically the petroleum marketing industry. Dr. Berry does not purport to have any such expertise. His point of view Your Honor, will be that of the professional economist without any particular expertise of the petroleum marketing situation. Rather he will employ the tools of analysis used by the professional economist to bear upon this particular legislation which he has reviewed and offer Your Honor his reasons as to what the effect of this Act upon the Maryland (T. 256) consumer will be and the basis for these conclusions.

Basically I believe, indeed I hope that Professor Berry will be testifying that the divestiture portions of the Act, Paragraphs B and C, by removing a type of competitor from the market, by preventing future entry in terms of both forward and backward integration is anti-consumer, anti-competitive and will probably result in higher prices.

* * *

(T. 256) (Affidavit of George W. Ruppersberger filed herewith as evidence as Plaintiffs' Exhibit No. 4).

(Mr. Greenwald) Also as a preliminary matter, Your Honor, the pretrial order on Page 15 refers to the stipulated facts concerning Gulf as Appendix D, D as in delta. As it was actually typed up, the reference is to Appendix B and I would simply like the record to reflect that it is Appendix D that relates to Gulf's stipulated facts.

I'd now like to call Dr. Charles H. Berry.

(T. 257) CHARLES HORACE BERRY,

a witness of lawful age after being duly sworn, deposes and says:

(Clerk) Please state your full name and address.